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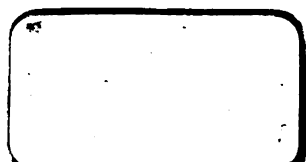
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J. L. Gilman
1835



A
PRACTICAL TREATISE
UPON THE
AUTHORITY AND DUTY
OF
JUSTICES OF THE PEACE
IN
CRIMINAL PROSECUTIONS.

TO WHICH ARE NOW ADDED
PRECEDENTS OF DECLARATIONS AND PLEADINGS
IN
CIVIL ACTIONS.

BY DANIEL DAVIS,

• **SOLICITOR GENERAL OF MASSACHUSETTS.**

Second Edition.



BOSTON:
HILLIARD, GRAY, LITTLE, AND WILKINS.
1828.

DISTRICT OF MASSACHUSETTS, *to wit:*

District Clerk's Office.

Be it remembered, that on the twenty-sixth day of August, A. D. 1838, and in the fifty-third year of the Independence of the United States of America, Hilliard, Gray, Little, & Wilkins, of the said district, have deposited in this office the title of a book, the right whereof they claim as proprietors, in the words following, to wit:—"A Practical Treatise upon the Authority and Duty of Justices of the Peace in Criminal Prosecutions. To which are now added Precedents of Declarations and Pleadings in Civil Actions. By Daniel Davis, Solicitor General of Massachusetts."—In conformity to the act of the Congress of the United States, entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned;" and also to an act, entitled "An act supplementary to an act, entitled 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JNO. W. DAVIS,

Clerk of the District of Massachusetts.

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PART SECOND.

Containing the **Form of a Justice's Record**, and of the several **Precepts, &c.** from the commencement to the conclusion of the process ;

The Forms of Complaints for every offence, both at common law and by statute ;

And Preliminary Notes and Remarks upon the nature of such offences.

To which are now added, such Precedents of Declarations and Pleadings in Civil Actions, as are usually required by Justice's of the Peace.

PART I.

CHAPTER I.

INTRODUCTORY REMARKS.

THE power of justices of the peace, in criminal prosecutions, is of great importance, and, indeed, essential to the execution of the laws for the punishment of crimes. In addition to the authority vested in them to try and decide upon certain offences intrusted to their jurisdiction, they have the power, and it is made their duty, upon legal complaint and information, to cause to be arrested and secured for trial, all persons guilty, or justly suspected to be guilty, of the highest as well as of the lowest breaches of the law. The administration of public justice, and the protection of property and life, require that this power should be deposited in faithful and judicious hands. If it were otherwise, the escape of offenders during the vacation of the public tribunals, or the necessity of arresting them by private individuals without official responsibility, would be the inevitable consequence.

In England, for a period of nearly five hundred years, this power has been intrusted (though not exclusively) to justices of the peace. In New England, from the time of its settlement, and the regular organization of its governments, the same policy has been adopted; and in many if not all the other United

States, similar authority has been exercised by justices of the peace, either by ancient usage, or by virtue of particular statutes.

It seems, therefore, of more than ordinary importance, that these officers should be well instructed in this branch of their duty. The part thus assigned them in the execution of the laws, renders it highly proper that their characters and qualifications should be such as to merit the public confidence. The ancient English statutes required, that they should "be of the best reputation, and most worthy men in the country." "And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible," other statute provisions were made, requiring that they should possess competent annual incomes from permanent estates. The remark is as applicable here, as it was in England, that these duties "are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without any sinister views of his own, will engage in the troublesome service."*

Many, perhaps the greater part of the magistrates in this country, have not the means of acquiring a competent knowledge of their official duties. With respect to such of those duties as it is the object of this undertaking to explain, no treatise specially confined to them, and fully pointing them out, has ever been published, either in this country, or (as it is believed) in England. In the year 1773, an abridgment of Dr. Burns's, "Justice of the Peace and Parish Officer" was made and published in Boston. This was a useful undertaking at the time; but much of the matter, selected for that abridgment, is inapplicable to, and foreign from the object of this work. A volume by Samuel Freeman, Esq. and another by R. Dickinson, Esq. upon the office and duty of justices of the peace, have also been published in Massachusetts. But very small portions, in either of these, relate to the subject of criminal prosecutions. They were, probably, not intended by their respectable authors, as complete guides in that branch of a justice's duty.

* 1 Blac. Com. 352, 354.

It is not to be expected that many of our practising magistrates can obtain the requisite information upon this branch of their duty from English law books. The more ancient treatises, such as those of Lambard, Crompton, and Dalton, have ceased to be practical guides, though frequently resorted to as venerable authorities. The work of Dr. Burns, before alluded to, is of high and unquestionable authority; but the former editions of it contain four volumes, by far the greater part of which is of no use to an American magistrate.* An analysis upon this subject is contained in the first volume of Mr. Chitty's Practical Treatise on the Crown Law, published A. D. 1816. The English edition of this work is in four large volumes, and comprises a complete system of practice, pleading, and evidence, in criminal prosecutions in the English Courts; together with a copious collection of precedents and practical forms used in those courts. This work is of value in the library of a lawyer; but a very small portion of it is of any immediate use to a practising magistrate in this country. The size and expense of it are somewhat diminished by a late edition in two volumes, by Richard Peters, jun. Esq. of Pennsylvania. Still the expense of purchasing this, or any other English work, merely for what it contains upon the particular duties of a justice of the peace in criminal prosecutions, cannot be readily or conveniently incurred. Two other works upon the powers and duties of justices of the peace and parish officers, have been published within a few years; one by Thomas W. Williams, in four volumes; the other by William Dickinson, in three volumes. The former work was published in 1812, and contains the whole law of England, relative to the office of a justice of peace, comprising also the authority of parish officers in England. The latter was published in 1822, and is a practical exposition of the law of England, relative to the office and duties of justices of the peace. These works are so loaded with English statutes of a local nature, with proceedings founded

*A new edition of Burns's Justice has lately been published by George Chetwynd, Esq. in five volumes, with the cases and statutes brought down to 1 Geo. 4th.

upon them, and other matter of very little use in this country, that the sight of them would be appalling to an American magistrate.

From these considerations, as well as from the advice and encouragement of many highly respected professional friends, this work has been undertaken. Its object is, to furnish gentlemen in the commission of the peace, with a practical and plain guide in that part of their duty which relates to public prosecutions, at so low a rate, as that they may be induced to incur the expense of obtaining what little assistance it may afford them. Some of the remarks and directions contained in the first part, (particularly in the last chapter, upon the subject of the taxation of costs, and returning the process into court,) and some of the forms in the second part of the work, are original; but it may be added (without ostentation, it is hoped,) that they are the result of more than twenty years' official experience. For these, no authority is claimed beyond what the reasons, upon which they are founded, may sanction; but for the residue, the confidence, both of the magistrate and the advocate, is respectfully anticipated; for they may be assured, that, with the exception of that portion of the work which is original, the matter contained in it is taken from the most approved authorities, and generally given in the words of the authors from whom it is selected. For this, no apology is offered. The danger and folly of departing from law language, by attempting to improve or refine it, are best known to those who have the greatest experience in, and veneration for legal and technical precision.

It may be observed, that the arrangement adopted in the first part of this work, is similar (though not pursued in precisely the same order) to that of others, who have written upon the same subject. . But it is, in fact, the only one which the nature of the subject suggests, or will admit. It purports to explain the duty of the magistrate, from the commencement to the conclusion of the prosecution. Any other course, therefore, must be unnatural and retrograde.

The work is more particularly calculated for the meridian of Massachusetts, and the other New England states ; but no effort has been spared to render it useful throughout the United States. Perhaps one recommendation of it may be, that it is not incumbered with any directions, forms of proceeding, or other matters which are peculiar to the practice in the English courts.

CHAPTER II.

THE COMPLAINT, AND APPLICATION FOR PROCESS.

WHEN a crime has been committed, and application is made to a magistrate for a warrant against the party accused, it becomes necessary to ascertain the grounds of the accusation so far as to enable the magistrate to decide upon the propriety of granting or refusing such application. Criminal prosecutions are carried on, in the name and (in this state) at the expense of the government ; and have for their object the public safety and security. Whenever, therefore, it shall be manifest, that mere private redress, and not the public good, or any breach of the laws, is the motive of the party applying, the magistrate may decline to institute the process.

The person injured, is usually the complainant, or prosecutor, as he is generally called in England. But every man of common right is entitled to prefer an accusation against a party whom he suspects to be guilty of an offence. In this country, where public prosecutions are carried on at the public expense, the privilege of originating them is often abused. Magistrates are liable to be imposed upon by the *ex parte* statements of the party complaining ; which are usually made under the influence of feelings excited by a strong sense of personal injury ; sometimes from motives of revenge ;—and not unfrequently from a disposition or propensity to appear at court in the character of a witness for the common-

wealth. It is an important duty of the magistrate, to acquaint himself with the real motives of the complainant; and in proper cases, to suspend the issuing of the process, and to turn the party over to the grand jury and public prosecutor. A predisposition in justices of the peace to commence a public prosecution upon trivial or groundless applications, is a great evil to the community; and, when it is indulged from selfish or pecuniary motives (as is sometimes the case with the hungry and *trading* part of them), requires exemplary correction.

It is, therefore, of importance to consider upon what evidence a complaint shall be received and a warrant granted. In the first place, a complaint cannot be received from persons disqualified to make oath to it. Of this description are all those who have been rendered infamous, and incompetent to testify as witnesses in a court of justice, by conviction of felony or any species of crime which necessarily implies falsehood. It is a general rule, and may be safely adopted and applied as such, that no complaint ought to be received upon the oath of a person who is by law disqualified from supporting it by his testimony on the trial of the party accused.* Persons thus disqualified, may disclose their knowledge of the crime complained of to others, and thereby enable them to bring an offender to justice, against whom they cannot of themselves give evidence†. But all persons are entitled to be witnesses, and consequently, to sanction, by their oath, complaints and applications for criminal prosecutions, who have the use of their reason, and have such religious belief as to feel the obligations of an oath, unless they are disqualified by interest, or have been convicted of an infamous crime.‡

An inquiry into the causes of the incompetency of witnesses would lead to a very extensive field of discussion. But in support of the rule above laid down, it may be safely added, that magistrates cannot receive the complaint of any person as the ground of a criminal prosecution, who has not a competent share of reason to know the nature of an oath, and understand its moral

* Parsons, Ch. Just. of Mass. in a Charge to the Grand Jury.

† 1 Chit. C. L. 3. ‡ Phil. Ev. 13. 7 T. R. 610. Gill. Ev. 129.

obligations ; such as very young children ;—persons insane ;—idiots or lunatics, unless in their lucid intervals ;*—nor of atheists, who profess not any religion that can bind their consciences to speak the truth ;†—nor of persons rendered infamous by the conviction of certain crimes, such as treason, felony, perjury, forgery, and such other offences of the same nature, as necessarily imply falsehood.‡

Persons legally entitled to prefer an accusation against a party, suspected of a crime, are bound to exert the power with which they are invested ; not from motives of revenge, but for the security of the peace and safety of the community. The object of criminal laws is not vengeance for the past, but safety for the future ; and to the furtherance of this design, every citizen is bound to contribute.§ This moral obligation is enforced by the laws themselves. For every person, knowing that a capital crime has been committed, and concealing it, is guilty of an offence. In such cases it is the indispensable duty, and only safe conduct of those who have knowledge of the crime, to reveal it as soon as possible to a justice of the peace or other magistrate.||—And although in cases of misdemeanor, this neglect is not in general punishable, yet if the crime be of a public character, it is illegal to receive or stipulate to receive, a compensation for suppressing a prosecution of it. And any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, or compounding for any public offence, is invalid.¶

But the nullity of such contracts is not the only effect produced by the suppression of public prosecutions ;—and as these attempts are usually made at the commencement of them, and are sometimes sanctioned or connived at by justices of the peace who are not well instructed in their duty, their injurious effects ought to be clearly pointed out.

* Phil. Ev. 14,—and authorities there cited.

† Phil. Ev. 22,—and authorities there cited.

‡ 1 Chit. C. L. 4.—4 Blac. Com. 120. 1.

¶ 5 East 298. 2 Will. 349.

† Phil. Ev. 17.

§ 1 Chit. C. L. 3.

It sometimes occurs when the accuser and accused meet before the magistrate, that their animosity towards each other is abated. At this early stage of the process, numerous temptations may present themselves to the parties, to stop or suppress it. Frequently the party complained of becomes convinced that he has no legal means of escaping punishment; and is therefore willing to *purchase* an exemption from it. When the injury is merely of a personal nature, the pernicious consequences of stopping the prosecution for it upon an agreement for a personal satisfaction, are not always perceived; and when such agreements are assented to by the parties, there have been instances of their being sanctioned or permitted by the magistrate. This practice is always illegal and criminal in the parties; and when participated in by the magistrate, the consequences to him may wholly depend upon the motives of his conduct. If he proceed ignorantly, and without any criminal design, he may possibly be excused from punishment; but if he permit himself to be influenced by selfish, pecuniary, or other unworthy or corrupt considerations, he becomes liable to exemplary punishment, impeachment, and removal from office. An ignorant magistrate may suffer much injury to be done in this way;—a corrupt one may prevent the punishment of the most atrocious offender, and thus defeat one of the great objects of civil government. For as the magistrate is the officer upon whose integrity and vigilance the government depends for the apprehension and security of the perpetrators of crimes, he may, if corrupt, at all times afford them the means of escape by permitting the accused to negotiate with and buy off his prosecutor.

This practice is severely frowned upon and punished by the common law. It is said to be an offence equivalent to that of champarty; and one that contributes to make the laws odious to the people. As early as the reign of Queen Elizabeth, it was punished by fine and standing in the pillory.* An agreement to stifle a prosecution is said to be a crime most detrimental to the commonwealth. For it is the duty of every man to prosecute,

* 4 Black. Com. 135, 136.

appear against, and bring offenders to justice. Any agreement to the contrary is said to be void by the common law, the civil law, the moral law, and all laws whatever. "*You shall not stipulate for iniquity.*" All writers upon our law agree, that a polluted hand shall not touch the pure fountains of justice.* And so chaste is the English law upon this subject, that it is made criminal by statute, for a man to advertise a reward for the return of stolen goods, with no questions asked, or words of the same import. It is also punishable for a man to receive his goods upon an agreement not to prosecute; and if he take money of the thief, whereby he escapes, he becomes an accessory to the offence.† It seems, therefore, of very great importance, both to the public and to the character and safety of a magistrate, that whenever a public prosecution has been commenced by him, he should proceed with it in a direct course, without the least regard to any private or personal views of the parties, which may be inconsistent with the due course of public justice.

At common law, a justice of the peace may institute a process for the punishment of an offence committed in his presence. He is thereby possessed of a double power in relation to the arrest of wrong doers; the first branch of which may be personally exercised on the commission of a felony or breach of the peace in his presence; the second, by issuing a warrant on the evidence and complaint of another. And if a justice of the peace see a felony or breach of the peace committed, he might, at common law, either himself arrest the parties offending, or verbally command any person to take them into custody.‡ The right to exercise this power, under our constitution, might well be doubted, if it had not been recognised by a particular statute. It has not been usually exercised in this state, since the adoption of its present constitution. And, indeed, it seems inconsistent with the doctrine of Chief Justice Pratt in the case of the *King vs. Wilkes*.§ He there gives it as his opinion, that if a magistrate has a particular knowledge that a person has committed an offence, it is not sufficient ground for him to commit the criminal; but in that

* 2 Wils. 349, 350.

† 1 Hale, 619.

‡ 1 Chit. C. L. 25; Bac. Abr. Justices of the Peace, E. § 2 Wils. 158.

case he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon act the official part, by granting a warrant to apprehend the offender ; it being more fit that the accuser should appear as a witness, than act as a magistrate. This advice is so salutary, that no arguments seem necessary to recommend it to the magistrates of this country.

The statute above alluded to was passed the 26th of February, 1796 ; the third section of which is in the following words,—
“ Be it further enacted, that any justice of the peace, for the preservation thereof, or upon view of the breach thereof, or upon view of any other transgression of law, proper for his cognizance, done or committed by any person or persons whatever, shall have authority (in the absence of the sheriff, deputy sheriff, or constable) to require any person or persons to apprehend and bring before him, such offender or offenders ; and every person so required, who shall refuse or neglect to obey the said justice, shall be punished in the same manner as for refusing or neglecting to assist any sheriff, deputy sheriff, or constable, in the execution of his office as aforesaid. And no person who shall refuse or neglect to obey such justice, to whom he shall be known, or declare himself to be such justice of the peace, shall be admitted to plead excuse on any pretence of ignorance of his office.” *

Whatever power to make these arrests is vested in justices of the peace, either at common law, or by the statute here quoted, such power ought to be cautiously exercised ; and indeed never resorted to, but in cases of extreme necessity—as for instance, where an atrocious crime has been committed, and there is no other means of preventing the escape of the offender. Perhaps it is unnecessary to add, that it is essential to the power and protection of the magistrate, that in these cases he act without malice, and upon plenary evidence that a crime has been committed.

When a justice of the peace finds reason to believe, that the party applying for a criminal process is actuated by motives of private interest rather than those of public justice, it is his duty

* Statute 1795, Chap. 68.

to examine him strictly, and to warn him of the liabilities he may incur. Prosecutions have been and may be originated from no better motive on the part of the complainants, than a desire to obtain advantages from them in civil suits depending upon the same facts. Numerous instances are recollected when hopes of this kind have been cherished relating to civil actions which have been tried in the lower courts, and are pending by appeal. The general object of these prosecutors is to obtain an indictment for perjury against some witness whose testimony has been unfavorable to them in a former trial, in order to disqualify him from testifying on an appeal or new trial. In these, and all similar cases, the magistrate should be careful not to involve the government in the expense, or subject the individual to the liabilities of a groundless or malicious prosecution. He can generally avoid the responsibility of refusing a process, by referring the complainant to the grand jury. It rarely happens that any injury or injustice is the consequence of this delay, unless the offence complained of may be barred by the statutes of limitation.

But on the other hand, when an offence, not within the jurisdiction of a justice, is to be carried for trial before the higher courts, and there appear to be sufficient grounds for the prosecution, it is highly expedient to commence the proceedings before the magistrate, whereby the party and witnesses for the government are bound over to the court in which the trial is to be had. This course affords so much facility to the public prosecutor, that he is thereby usually enabled to save the time and expense of a whole term. In such cases the law insures to the prosecutor all due protection. He cannot be injured in the discharge of this duty, unless his proceedings are instigated by malice, and destitute of any probable foundation.*

A justice of the peace may, upon deliberate consideration, refuse to institute a criminal process. But this cannot be legally done where there is an accusation upon oath of an offence of a higher nature than is within his jurisdiction, if there appear any reasonable ground for the charge. Yet, if there be a positive charge on oath, and the justice sees that there is no credit to be

* 1 Chit. C. L. 10.

given to it, he may decline receiving the complaint and issuing a warrant.* He must act honestly and judiciously, as well towards the government as the party,—he must have a “stout and upright heart, and clean and uncorrupted hands,”†—and when that is the case, he can be subjected to no injury on account of his official conduct.

If the magistrate, after deliberate consideration, determines to institute a process, he will commence it by receiving the complaint of the party applying for it; which complaint ought to be, both in form and substance, adapted to the crime complained of, and to be sanctioned by the oath of the complainant. This prerequisite is required in England, and it is presumed in the United States. In Massachusetts, it is in pursuance of the 14th article of the Declaration of Rights; which is in these words,—“Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions; all warrants, therefore, are contrary to this, if the cause or foundation of them be not previously supported by oath or affirmation.”‡ The course for the complainant is, to go before a justice of the peace, sometimes accompanied with other witnesses, and state the facts upon which the application is founded. The justice then should interrogate the accuser, and other witnesses, if present, so as to enable him to judge of the nature of the complaint, and the propriety of instituting the process. He then draws up the complaint in legal form, unless the complainant present one ready drawn by counsel; which is often done in cases requiring particular technical accuracy; such as perjury, conspiracy, and the like. The complaint is then signed by the accusing party, and the oath or affirmation to its truth and justice, administered by the magistrate. Upon this the warrant is usually issued.

The mode of administering an oath varies in the different states; and is also made conformable to the religious principles of the witness. In the New England states, the ceremony of holding up the right hand is adopted. This ceremony is not

* 1 Chit. C. L. 32.

† Dalt. J. 6.

‡ Constitution of Massachusetts, 14th article of rights.

required of Quakers and others, who decline taking an oath on account of their religious scruples.* To these an affirmation is administered ; which is done without the form of holding up the hand. In the southern states, the form of administering an oath is upon the Holy Evangelists ; and the witness, upon the conclusion of the ceremony, is required to kiss the book (usually the New Testament), which supposes him to be a christian.† When the testimony of those who are not christians is required, the law allows and sanctions those forms and ceremonies to be used in the administration of oaths to such persons, which are peculiar to their religion, and consequently most binding upon their consciences. Therefore Jews may be sworn on the Old Testament ; Mahometans on the Alcoran ; and Gentooes, and of course all others, according to the ceremony of their religion.‡ If the law requires an oath, and a witness does not believe in any form of religion, he cannot be sworn ;§—and consequently, the oath of such a person to a complaint presented to a magistrate ought to be refused. If a Jew, or any other person, professing the belief of a Supreme Being and of a future state, consents to be sworn according to the usage in our courts, he will be permitted to do it, and thereby may incur the penalty of perjury, as much as if sworn upon the Old Testament ; or according to the ceremonies of his own religion.||

In Massachusetts by statute 1797, chap. 35, sect. 10, it is enacted, that “ in the administration of oaths in this commonwealth, the ceremony of lifting up the hand, as heretofore used, shall be practised, with such exceptions as to *Mahometans* and

* Statute 1824, Chap. 91. † Phil. Ev. 19 ; 1 Chit. C. L. 502.

‡ Phil. Ev. 19 ; 1 Atk. 21, where the ceremony of administering an oath to a Gentoo is given.

In the case last quoted, a Gentoo was admitted as a witness, and sworn according to the ceremonies of the religion of his nation. The oath prescribed to be taken was interpreted to him ; and after it was administered, he touched the foot of a Bramin or priest of the Gentoo religion. If the witness be himself a priest, he is to touch the hand of another Bramin, this being the most solemn form in which oaths are usually administered to witnesses who profess the Gentoo religion. *Phil. Ev.* 19 ; 1 *Atk.* 21.

§ Phil. Ev. 18.

|| So ruled by Jackson J. in a late case in the Sup. Jud. Court.

other persons who believe that an oath is not binding unless taken in their accustomed manner, as the several courts shall find necessary in the execution of the laws."—Justices of the peace in all proceedings before them are to be governed by this law.—See also *Mass. Statute*, 1810, *Chap.* 128.

The form of the complaint requires particular consideration. It must describe the party charged and to be apprehended, and the offence of which he is accused, with sufficient technical accuracy. By the provision of magna charta, no person can be taken or imprisoned but by the lawful judgment of his peers, or the law of the land. The 12th article of the Declaration of Rights in the constitution of Massachusetts, is founded upon this provision of the great English charter. It contains a more intelligible and particular recognition of the rights of the subject, than is specified in the part of magna charta above recited. It is in these words, "No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally described to him." All persons arrested by virtue of a warrant from a justice of the peace upon complaints for breaches of the laws, are "held to answer for them" within the meaning of this provision. It follows, therefore, that the crime or offence for which they are held to answer, ought to be fully and plainly, substantially and formally described. A complaint setting forth, in general terms only, the crime complained of, if within the jurisdiction of the justice, is not sufficient, in those governments where there is similar constitutional provision.

The preceding remarks are applicable, strictly speaking, to those complaints only, which relate to offences within the jurisdiction of the justice. Although, in all other cases, this accuracy ought to be adhered to, yet the justice has no right to quash the complaint for informalities, and discharge the party for that cause, his duty in all cases beyond his jurisdiction being nothing more than to examine into the grounds of the complaint for the purpose of deciding, whether the party accused shall be bailed, committed, or discharged.

In England it may be otherwise ; yet there, perfect accuracy is required in setting forth the crime in an indictment. The doctrine in the case before cited, of the King *vs.* Wilkes, cannot, it is presumed, be law in this country, *viz.* that the grounds of a charge need not be set forth ; and (as it appears by a quotation from Hawkins in that case) that a commitment for treason without any particular accusation or ground of suspicion, is good !— And although it is said in that case, that neither Hale, Coke, nor Hawkins takes notice that a charge is necessary to be set out in a warrant, it appears to be the constitutional right of all persons, under this government, to require it.

But whether the constitutions of our country have or have not changed the common law upon this subject, there is no necessity nor even apology for a careless or incorrect manner of conducting any judicial process ; especially one which controls the personal liberty of the subject, and requires him to defend himself against a criminal accusation. When, therefore, a magistrate institutes such a process, it is his duty to make it conformable to the requirements of technical precision ; first, as to the description of the party accused ; and, secondly, as to the description of the offence.

First, The name of the party to be apprehended, if known, must be correctly stated in the complaint and warrant ; and must not be left in blanks to be filled up after they are delivered to the officer.* If the process be defective in this particular ; that is, if there be a mistake in the name or addition of the person on whom it is to be executed ; or if the name of such person be inserted without authority, it is fatal to the process, and may be injurious to the officer who executes it.† But if the name of the party to be arrested be unknown, the complaint may state and the warrant be issued against him, by the best description the nature of the case will allow. As “the body of a man whose name is unknown, but whose person is well known, and who is employed as the driver of cattle, with a badge, No. 573.”‡

* 1 Chit. C. L. 39 ; 2 Hale, 114.

† Foster, 812 ; 1 East, P. C. 810.

‡ 1 Chit. C. L. 39, 40.

Although in the loose practice of some magistrates it is not usual to state in the complaint any addition of place or degree, yet it is always expedient and proper to do so. These particulars are usually well known to the magistrates issuing the process; and there is no reason why they should be dispensed with in this, more than in other judicial proceedings.—It may be added, that the necessity of inserting the addition, is put upon the same ground as that of the name of the party, in the English authorities upon this subject; and the consequences of a defective process in either of these particulars, are there said to be the same.*

Secondly, As to the allegations in the complaint, and manner of setting forth the offence. From what has been observed, it appears to be expedient, perhaps necessary, that under our constitutions the crime should be more formally set forth in the complaint, than what is required at common law. It will accordingly be found, that in the forms of all the complaints contained in the second part of this volume, as much technical precision has been attempted, as is required in an indictment.—The reason given for a contrary practice by the English common-law writers, is, that cases may occur in which it would be imprudent to let even a peace-officer know the crime of which the party, to be arrested, is accused. In charges of a capital nature, it is said not to be necessary to state the cause upon which the warrant is granted; and that it seems rather discretionary than necessary, to set it forth in any case.† Yet the same authorities state it to be advisable in bailable offences to set forth the special cause of the complaint, in order that the party may be provided at once before the justice, with sufficient sureties.‡

The necessity or reasonableness of a technical description of the offence arises, under our government, from a different and higher source,—that of the constitution. Whenever a man is arrested by virtue of a defective process, he may, in some sort, be said to be unlawfully restrained of his liberty. In addition to which, it may be suggested, that the object of the arrest may be

* Foster 312; 1 East, P. C. 310.

† 1 Chit. C. L. 33, and the authorities there cited; 2 Hale, 111. ‡ Ibid.

defeated, and the criminal's chance of escape increased, by this deficiency. He is entitled to the full benefit of the constitutional provisions in his favor. To know the precise nature of the offence, against which he is called upon to defend himself, is one of them. If it can be dispensed with in part, it may be, for the same reason, in whole; and in this way the authority of the government may be perverted to the most vexatious and tyrannical purposes. The reason given by Lord Hale, why the complaint and warrant should contain the cause of the arrest specially, appears to be unanswerable, *viz.* that if they are generally, *to answer such matters as shall be objected against him*, it cannot appear whether the cause be within the jurisdiction of the justice of the peace; neither can it appear whether the party be bailable.*

It is well settled that a justice of the peace may receive a complaint and institute a process, upon the probable suspicion of the complainant, although formerly it could not be done, unless the suspicion arose originally in the breast of the magistrate.† Arrests upon suspicion by private persons are barely *permitted*, but not *enjoined* by the common law.‡ The complaint and warrant must state the name of the suspected party, who is to be apprehended; for a warrant to apprehend *all* persons suspected, is illegal. A general warrant to apprehend all persons suspected, without naming or describing any person in particular, is illegal or void for its uncertainty; for it is the duty of the magistrate, and not to be left to the officer, to judge of the ground of suspicion.§ Such a process would not only be void, but an action for false imprisonment lies against the officer who makes an arrest upon such a warrant.||

In Massachusetts, this power to commit, or hold to bail, all persons *suspected* to be guilty of capital, or lesser offences, is given to justices of the peace by statute. The statute of 1783, chap. 51, vesting certain powers in justices of the peace in criminal

* 1 Chit. C. L. 11; 2 Hale, 72, 108.

† 4 Blac. Com. 290, 287.

‡ Burn. J. "Arrest," where the grounds of a suspicion that will justify an arrest are stated; 4 Blac. Com. 290.

§ 1 Chit. C. L. 42.

|| 1 Hale, 580.

cases, has this provision, “ And justices of the peace shall examine into all homicides, murders, treasons, and felonies, done and committed in their counties; and commit to prison all persons guilty or *suspected* to be guilty of manslaughter, murder, treason, or other capital offence; and to hold to bail all persons guilty, or *suspected* to be guilty, of lesser offences, which are not cognisable by a justice of the peace.” Under this statute the practice has become general, for the complainant to charge the party upon suspicion, and not by a direct allegation of his guilt. This practice, however, ought to be governed by the circumstances of each case; for where the *knowledge* of the crime and of the party accused must of necessity be possessed by the complainant, as in cases of personal injury, assaults and batteries, &c. it is somewhat ludicrous for him to swear that he *suspects* a party to be guilty, with whom he has had the personal conflict.

The power thus exercised of arresting persons before trial, and upon probable suspicion, is founded upon the same principle of justice, as that which permits an arrest in civil cases on *mesne* process, for the security of the person of a debtor, before the merits of his case can be ascertained by a trial. 1 *Chit.* 12.

Having referred to a part of the statute vesting powers in justices of the peace in criminal cases, the importance of those powers in the administration of justice, and the punishment of crimes, may be the subject of a few remarks. The conservation of the peace is the very end and foundation of civil society; and has been one of the first and favorite objects of the common law.* Both in England and America, the highest officers of state have been, *ex officio*, associated with justices of the peace, for its preservation. In some countries, the tyranny and oppression exercised over the subject, by officers liable to no responsibility except to their immediate employers, are among the greatest horrors of a despotic government. A power to arrest offenders, and secure them for trial, which can at all times be called into immediate exercise, is indeed essential to the prompt and successful administration of justice.—The necessity of guarding such a power in

* 1 Blac. Com. 349.

the hands of any order of the community, is coextensive with the liability to, and danger of its abuse. It has been abused ; although instances of it have seldom occurred. A corrupt magistrate is a monster rarely to be met with in this country. Few as their number are, they are objects of the scorn and contempt of all classes of the people. A mercenary and profligate justice of the peace, is one of those nuisances, which nothing can remove or cleanse, until he is hunted down by public indignation. On the other hand, those of upright and respectable characters, have the thanks and the support of all the friends and advocates of good government.

Justices of the peace are said to possess all the powers of ancient conservators of the peace at common law, in suppressing riots and affrays, in taking security for the peace, and in apprehending and committing felons and other inferior criminals.* Such are the important powers vested in them by the statute under which they derive their authority in criminal prosecutions, that in this state, the whole authority of the government for the preservation of the peace and punishment of criminals, during the vacation of the superior tribunals, in a great measure devolves upon them. For in addition to those offences which are within their jurisdiction to try and punish, they are authorized and required by this statute, to cause to be stayed and arrested all affrayers, rioters, disturbers and breakers of the peace, and bind them by recognisance to appear at the next Supreme Judicial Court (or other court of inferior jurisdiction, at their discretion ;) and to require such persons to find sureties for keeping the peace and being of good behavior, until the sitting of the court they are to appear before, and to commit such persons as shall refuse so to recognise. Their duty also requires them to examine into all homicides, murders, treasons, and felonies, and to commit to prison all persons guilty or suspected to be guilty of those offences ; and to hold to bail all persons guilty or suspected to be guilty of lesser offences ; to require sureties for the good behavior of dangerous and disorderly persons ; and to take cognizance of all

* 1 Blac. Com. 354.

other crimes, matters, and offences, which by particular laws are placed within their jurisdiction.

These important powers and duties of a justice of the peace will be more particularly commented upon in the subsequent chapters, and in their more appropriate places.—They are recited and referred to in this place from the statute last mentioned, as containing a summary of those duties and cases which relate more immediately to the subject of this chapter, *viz.* to the receiving of complaints, and applications for criminal processes;—in every case embraced within the provisions of this statute, it is the duty of a magistrate to institute a process, if the grounds of the application are made clear and satisfactory to him.

The form and requisites of the warrant, and the manner of issuing it, are the next subject of consideration. In order of time, they immediately follow the drawing up and receiving of the complaint;—at common law, whenever an authority is granted to hear or determine offences, a power to issue compulsory process is incidentally given; for there can be no inquiry respecting offences, without the presence of the party accused; and wherever the power is intrusted of examining into or determining the former, there must also be authority to compel the latter.*

From the nature and object of the process, it follows, that there can be no necessity for it when the defendant is present in court, but only when he is absent.† This remark, however, taken from the authorities cited, is applicable to cases pending by indictment in the higher courts; in which, by the power incident to and practice in those courts, the party, if voluntarily or accidentally present in court, may, at the discretion of the court, be arraigned, and held to recognise for his appearance from day to day, and abide the order of court. But if a party, against whom a complaint is exhibited before a justice of the peace, be present at the time the complaint is received, it is not known to be the practice, or within the power of the justice, to

* 1 Chit. C. L. 338; Burn. J. Process; Com. Dig. Process A. 1; Dalt. J. C. 193.

† Hawk. b. 2, c. 27, s. 1; Burn. J. Process; 1 Chit. C. L. 338.

put the party to plead, or order him to recognise for his appearance at the higher courts, or to commit him, unless he has been previously taken into custody, by a warrant. The power in the courts of superior jurisdiction to order a party to be arraigned when present in court, is discretionary.* But in similar cases before a magistrate, it is obligatory. For in all cases before a justice of the peace, when a person is charged with a crime of a high or aggravated nature, and which is not entrusted to his jurisdiction, it is his duty to commit or bail him, as the circumstances of the case may require. This distinction between the powers of the superior courts and justices of the peace, in regard to persons present, but not in actual custody before them, is further strengthened by the words of the statute before cited, giving powers to justices in criminal cases. They are required by that statute, to cause to be "stayed and arrested" persons guilty, or suspected to be guilty of the crimes and offences therein enumerated; which seems to imply the necessity of legal process. In these cases, nothing is to be presumed in favor of a justice's jurisdiction.†

The practice of going before a magistrate, by persons who have been guilty of breaches of the peace, confessing themselves guilty, and paying a small and inadequate fine, has been the subject of complaint and reprehension, both in this country and England. The object of such persons is to prevent or bar a process from another justice of the peace, founded upon the complaint of the injured party.‡ The mischief and abuse have been the same, where a colorable prosecution has been instituted by a friend of the offender. Attempts of this kind are usually abortive;—for in general, the proceedings in consequence of them are of no validity; as no sentence or order of a justice of the peace is of any validity or authority, unless they are made and obtained *bonâ fide*. Whenever, therefore, applications of this nature are made to a justice, he ought generally to decline acting upon them at all; but never in the absence of, or without notice to the party injured. A sentence, thus obtained, is no bar to

* 1 Chit. C. L. 338; 4 Burr. 2531.

† Hawk. b. 1, c. 60, s. 14.

‡ 4 M. R. 641.

another prosecution for the same cause of complaint ; the general effect of them is nothing more, than to show the consciousness of guilt on the part of the offender, and the want of judgment, and sometimes of integrity on the part of the magistrate. And when the case is, as it has been known to be, that there is an understanding, or rather a combination between the party and the magistrate, to prevent, in this way, the due course of justice, they are both of them liable to a public prosecution and exemplary punishment.

With respect to the form and requisites of the warrant, the first inquiry is, to whom it shall or may be directed.—The invariable practice in this state is, to direct it to the sheriff of the county or his deputy, or to either of the constables of the town, within which it is to be executed. By the second section of the article last before cited,* all sheriffs, constables, and other officers, are directed and empowered to execute warrants issuing from a justice of the peace. In England a justice of the peace may direct his warrant to any indifferent person by name, who is no officer ; for a justice may authorize any person whom he pleases to be his officer ; yet there it is considered most advisable to direct it to an officer, within whose precinct it is to be executed.—But a decision of the Supreme Judicial Court of Massachusetts has changed the common law in this particular ; it is now settled in this state, that a justice of the peace has no authority to direct his warrant to a private person.

This decision was made in the case of *Commonwealth vs. Samuel Foster & al.*† in which the law is so fully and clearly laid down, that a minute statement of it may be of use to those magistrates who govern their practice by the old authorities, and who may not be possessed of the volume in which it is reported.

The defendants were indicted for an assault and battery upon one Philip Weaver, he the said Philip being, as it was alleged, duly and lawfully appointed to execute a certain warrant, legally issued against one Richard Foster ; and that said Weaver was in the due and lawful execution of the said warrant. Samuel Foster and David Page, two of the defendants, were tried together ;

* 1 Mass. Laws, 160.

† 1 Mass. Rep. 488, 2d edit.

and a verdict was found, that they were severally guilty, subject to the opinion of the court, whether the warrant given in evidence was a lawful authority to Weaver and his assistants, who acted under the same, in arresting and detaining the body of the said Richard Foster. The warrant was issued by a justice of the peace, for an assault and battery, and was directed "to the sheriff, &c. or his deputy, and to all and any of the constables of the town of Winthrop, or to *Philip Weaver, jun.*" commanding them to apprehend, &c. The opinion of the court was delivered *seriatim*, by the three justices who sat in the trial; which opinion was unanimous, against the right or authority of the justice to direct his warrant to Weaver, and against Weaver's power to execute it; and was to the following effect; that,

The office of justice of the peace when first introduced into this country in all particulars then applicable, or which have since become applicable, may be considered as possessing here the general character and functions allowed to it in England, by force of the statutes which had there created and regulated this ancient and important office. It became subsequently, of course, a subject of legislation here. The form of the oath was appointed; by which a justice of the peace was required "not to direct his warrant to the parties," but to the sheriff, &c. "or other officer proper for the execution of the same." Until the adoption of the present constitution, justices of the peace were sworn, according to the tenor of this oath, which by plain implication, if not by the very terms of it, prohibited them from issuing their warrants to private persons.

The constitution abolished this form of oath, by directing a general form for all civil officers; but this abolition cannot be construed to confer any authority, which for so long a time had been denied or disused. The statutes since the revolution have enumerated very particularly the powers and duties of justices of the peace, whose office exists at this time principally, if not entirely, according to the provisions of those statutes; which cannot be construed to confer any power, in criminal cases, not enumerated. The statute, vesting powers in justices of the peace in criminal cases, directs sheriffs, &c. and other officers to exe-

cute warrants issuing from justices of the peace ; and justices of the peace have authority to command the assistance of those officers, and of *other persons present* at any affray, &c. The silence of the legislature as to the authority of private persons to execute warrants, as well as the direction respecting private persons who may be present at an affray, &c. affords a strong implication, that no private person had, or ought to have, any other authority, than is there prescribed. This implication is strengthened by a more recent statute,* subjecting to punishment those who pretend themselves to be officers, and requiring aid as such. By this latter statute, justices of the peace have authority, "*in the absence of the sheriff, deputy sheriff, or constable,*" to require the aid of private persons. It could not be the meaning of the legislature to restrain an authority by them understood to exist at all times and on all occasions, to be employed only in the absence of the civil officers ; and that in describing the offence of unlawfully requiring aid under pretence of office, there should be no provision for the case of a private person, acting by a warrant of a justice of the peace. The denial or disuse of this mode of process, and the implied negative of the legislature upon it, are sufficient arguments against it.

It is said in this case of *Commonwealth vs. Foster & al.* to be of importance for the security of individuals, to be established, "that in no case but where it shall be necessary, and that necessity expressed in the warrant, ought the warrant of a justice of the peace to be directed to a private person."† But it may be answered, that if there exists no authority in the justice, to direct his warrant to a private person, (which is understood to be the point decided in this case) the *necessity* will not sanction the practice, without legislative provision ; more especially, as on the one hand, the law has provided for the apprehension of offenders ; and on the other, it ought to guard against oppression. In cases where an arrest is authorised, the law has provided its corps of officers, prescribed the limits of their powers and duties, and imposed oaths for their fidelity. Does it consist with that anxious regard for personal liberty which all governments ought to feel,

* Statute 1795, Chap. 68.

† By Sedgwick J.

that it should be permitted, by the most ordinary magistrates, without any special reason, and probably from unworthy motives?—Is it consistent with personal security, to permit them to employ, in the execution of their warrants, any individual whom they shall think proper to select? While this authority is expressly withholden from them in many instances, would it not be extraordinary and even absurd to say, that by law they may exercise this power according to their will, and without any pretence of necessity? So long as the decision in this case remains unreversed, it is considered that the law in Massachusetts is settled as to this question, *viz.* that a justice of the peace has no authority to direct his warrant to a private person.

The warrant must be under the hand and seal of the justice who makes it out; although some of the ancient writers have thought it sufficient if it be in writing and subscribed by the justice.* A failure in this requisite makes the warrant void, and, as it is said, subjects the officer using it to an action for false imprisonment. In some cases, a want of formality in the warrant may be blamable in the justice that makes it, and yet will not subject the officer to an action for false imprisonment, if the matter be within the jurisdiction of the justice who issues it.†

The warrant ought to set forth the year and day wherein it was granted; that in an action brought upon an arrest made by virtue of it, it may appear to be prior to such arrest.‡ It is safe, though not necessary, to show the place where it was made; but it must set forth the county, in the margin, at least, if not in the body of the warrant.§

It must be made in the name of the Commonwealth, as appears from the precedents in the second part of this volume; and it must set forth the cause upon which it is granted.

It has been the common practice in this commonwealth for justices to draw the complaint and warrant upon the same sheet of paper; and instead of setting forth in the warrant, the cause upon which it is granted, to refer to the complaint which is an-

* 1 Hale, 576; Hawk. b. 2, c. 13, s. 21.

† 1 Hale, 576, 577.

‡ Hawk. b. 2, c. 13, s. 22; Dalt. c. 117, 121.

§ Hawk. b. 2, c. 13, s. 23.

nexed, and in this way make it a part of the warrant. There seems to be many objections to this practice. It is presumed to be unknown at common law, and is sanctioned only by our usage. The complaint is a distinct and important part of the process. It contains the accusation upon which the party is to be arrested. It is to become a matter of record, and therefore ought never to be out of the office, keeping, or power of the magistrate. In cases within the jurisdiction of the justice, it may be the subject of a plea to his jurisdiction, plea in abatement, demurrer for informality, and of a motion in arrest of judgment, both before the justice, and, in cases of appeal, before the court of Common Pleas.—For these reasons it is manifestly improper that it should be delivered out to the officer, with the warrant, to be by him carried wherever it may be necessary for him to go to execute the warrant, and thus be exposed to loss, injury, or mutilation. The practice in this case ought to be similar to that of filing the indictment, and issuing the *capias* or warrant thereon, in the higher courts. The reason for it is precisely the same. In those courts, the indictment, when returned into court by the grand jury, is filed of record, and a warrant against the party accused is ordered to issue, in which an abstract of the charge in the indictment is inserted, stating in general terms the crime alleged. It would be dangerous and absurd in the highest degree, to depart from this practice in the courts having jurisdiction of crimes to be prosecuted by indictment. Yet the complaint and warrant in a justice's court are of the same nature (and the practice concerning them ought therefore to be grounded upon the same reasons), as the indictment and warrant in the Common Pleas and Supreme Court.—What would be a sufficient abstract of the complaint to be inserted in the warrant, so as to show a legal cause for issuing it, will be stated in the forms of warrants herein after contained.

The warrant may also be general, to bring the party before any justice of the peace in the county; or special, to bring him before the justice only who granted it.* If it be general, the election of the magistrate before whom the party is to be taken

* Hawk. b. 2, c. 13, s. 2; Dalt. c. 117.

lies in the officer, and not in the prisoner.* If the warrant be special, and returnable only before the magistrate who granted it, the officer is bound to carry the prisoner before him.

Until a late statute, a warrant from a justice of the peace in this state could not be executed out of the county in which the justice granting it lived. By that statute, the sheriff or his deputy to whom the warrant is directed, has power to apprehend the person complained of, in any county of the commonwealth.† This statute will be again referred to in a subsequent page, in which the law relative to the backing of warrants will be stated.‡

If the warrant be filled up by the magistrate before he issues it, though after he signed it, the proceeding is regular;§ and where a married woman commits an offence without her husband, the complaint and warrant should be only against her.||

The warrant of a magistrate is not returnable at any particular time; and it continues in force until it is fully executed and obeyed.¶ It need not state the time when the party is to be brought before the magistrate for examination. This is never done in any warrant whatever; nor is it possible to do it without manifest injury to the party; for if a distant, or any period should be limited, he must remain in custody during all the time between the issuing of the warrant, and the day limited for its return; whereas he is entitled to be discharged the first day, if it should appear that he is innocent. The law has fixed a time; for by law, the officer is bound to carry the party accused *immediately* before the magistrate; and if he delay so to do, it is contrary to the duties of his office.** The practice is invariable in Massachusetts, to make the warrant returnable *forthwith*.

Prior to the Statute of 1820, chap. 52, before referred to, the warrant of a justice of the peace could not be executed out of his county, unless it was *backed*, that is, endorsed by a justice of the county in which it was to be carried into execution. By this statute, the doubts and difficulties arising from the practice

* 1 Chit. C. L. 39; 2 Hale, 112; 1 Hale, 581.

† Passed Feb. 12th 1821.

‡ Post, p. 27.

§ 1 Chit. C. L. 40.

|| Id.

¶ Peake's Reports, 234.

** 1 Chit. C. L. 40; 8 T. R. 110.

of backing warrants, are done away in this state. It provides and enacts, "that whenever a warrant against any person shall be duly issued by a justice of the peace within this Commonwealth, for any supposed offence committed within his county, or in pursuance of the provisions of law for the maintenance of bastard children, and the persons complained of shall, either before or after the issuing of such warrant, escape or go out of said county, the sheriff or deputy sheriff thereof, to whom the said warrant may be directed, shall have power and authority to pursue the person complained of, and to apprehend him in any county in this Commonwealth, and to convey him into the county in which the act complained of may have been committed, that such proceedings may be had as the law shall require." It is remarkable that the wholesome and necessary provisions of this statute should have been so long delayed, and the practice of backing justices' warrants should have been left upon the loose and uncertain ground of the common law; more especially, as similar statute provision was made in England as early as the reign of George II. Subsequent statutes have also introduced regulations of a similar nature.* The provisions of this English statute, however, are different from those of our own; which are more simple, and better calculated to carry into effect the intention of the legislature. By the former, the offender, upon being arrested in the county to which he had escaped, must be carried before a justice of that county; and if the offence be bailable, must there give bail for his appearance to take his trial; but if not bailable, or the party be unable to find bail to the satisfaction of the justice, he is to be sent back for trial to the county in which the offence was committed. Our statute has adopted this latter provision; and authorizes the arrest of the offender in any county to which he may have escaped; and directs that he shall be, in all cases, conveyed back into the county where he is to take his trial.

It will be observed, that the power to execute the warrant of a justice of the peace in a county other than the one in which he lives, is limited, by the above mentioned statute of this state,

* 1 Chit. C. L. 45, 46.

to the sheriff or deputy sheriff of the county in which the warrant was granted. It is apprehended therefore, that no officer or other person, of the county to which the offender may have escaped, is authorized by virtue of this statute to make the arrest, or to execute the warrant. A justice therefore will be careful, not to direct a warrant which is to be executed in another county, and without his ordinary jurisdiction, to any officer or person but the sheriff or deputy sheriff of his own county. But if such warrant should be directed to other officers, such as constables &c. yet, if it be also directed to the sheriff or deputy sheriff of the county, in which the warrant is issued, and be in fact executed by them, the direction to other officers will not render an arrest made by such sheriff or deputy sheriff illegal.

The practice of backing justices' warrants has heretofore been regulated in this state by the common law. Some have doubted the legality of the practice. In those states in which no statute provision exists, unless they have adopted the practice and usage as pointed out in the statute of Geo. II. and others subsequent thereto, the directions of the common law must still be the only guide. This practice had long prevailed in England without law, but was at last, as it is before stated, authorized by statute.* It is said that formerly, there ought in strictness to have been a fresh warrant, in every fresh county,† but this cannot now be necessary.

The granting of search warrants is a part of the duty of a justice of the peace, which requires particular consideration. On the one hand, the discovery of stolen goods is frequently the effect of these warrants; on the other, the power of granting them may be easily abused, and great injuries, to innocent persons both as to their reputation and property, thereby occasioned. Ancient writers upon the criminal law differed as to their original legality. Lord Coke said they were contrary to law;‡ and Lord Camden said they had *crept* into the law by imperceptible practice; but Lord Hale, it is said, has clearly established their

* 4 Bl. Com. 289.

† See post—the form of endorsement, or backing a warrant in part 2d.

‡ 4 Inst. 179.

legality upon the ground, that without them, felons would frequently escape detection.* A late statute has established their authority in England, and also pointed out the manner in which they shall be executed.† Search warrants for libels, and other papers of a suspected party, are illegal, for, as observed by Lord Camden, the difference between seizing stolen goods, and private papers of the party accused, is apparent. "In the one case I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property would be seized before conviction, and he have no power to reclaim them even after his innocence is made clear by an acquittal."‡

The search warrant cannot be granted without an *oath*, made before the justice, of a felony committed; and that the party complaining has probable cause to suspect that the property stolen is in a particular place, and showing his reasons for such suspicion.§ Before the statute of 22 George III. which directed that the search should be made in the *day time*, it appears from Lord Hale, that the warrant should direct the search to be made in the day time only;|| for in many instances, under pretence of searches made in the night, robberies and burglaries have been committed. But it is added in another authority,¶ that in a case not merely of probable suspicion, but of positive proof, it is right to execute the warrant in the night time, lest the offenders, and goods also, be gone before morning. The warrant ought to be directed to an officer, and not to a private person. In Massachusetts, as we have seen, no warrant can be executed by a private person.** The above rule, however, ought to be attended to and observed in all the states where there is no judicial decision upon the subject, and where the rules and practice of the common law are still followed. It is proper that the complainant should always attend the officer in the execution of the warrant,

* 1 Chit. C. L. 64; 2 Hale, 118; 2 Wils. 149, 291.

† 22 Geo. 3d; 1 Chit. C. L. 64.

‡ 11 St. Tr. 821, in which there is an ample discussion of this subject.

§ 1 Chit. C. L. 65; 2 Hale, 112, 113.

|| 2 Hale, 113, 150.

¶ 1 Burns J. Search Warrant.

** Ante, p. 25.

because he will be able to indentify the property seized.* And the warrant should direct, that the goods found, together with the body of the person in whose custody they are taken, should be brought before the justice, to the end, that upon further examination the goods and the prisoner may be disposed of as the law directs.†

Although there are precedents of *general warrants* to search all suspected places for stolen goods,‡ yet at common law they are illegal, because of the danger and inconvenience of leaving it to the discretion of a common officer to arrest such persons, and search such houses, as he thinks fit.§ And in the great case of *Money v. Leach*, Lord Mansfield declared, that a warrant to search for, and secure the papers and person of the author, printer, and publisher of a libel, is not only illegal in itself, but is so improper on the face of it, that it will afford no justification to an officer acting under its sanction.|| Such warrant, therefore, must specify the place to be searched, as well as the particular person to be taken.¶

With respect to the mode of executing this warrant, if the door be shut, and, upon demand, not opened, it may be broken open, and so may boxes, after the keys have been demanded; and though the goods be not found, the officer will be excused. But if the party obtaining the warrant act maliciously, he is liable for a special action on the case. The officer must strictly pursue the directions of his warrant; for if he be directed to seize one kind of article, and he seize another, he is a trespasser. If the goods be not in the house, yet the officer is excused that breaks open the door to search, because he searched by the authority of his warrant, and he could not know whether the goods were there until search was made; but the party that made the suggestion is punishable; for as to him the breaking of the door is punishable or not punishable, according to the event of finding or not finding the goods.**

* 2 Hale, 150.

† Id.

‡ Dalt. J. 353, 354.

§ 1 Chit. C. L. 65; 2 Hale, 114, 150; Hawk. b. 2, c. 13, s. 10 & 17.

|| 3 Burr. 1766; 2 Wills. 291.

¶ 1 Chit. C. L. 66.

** 2 Hale, 151.

Upon the return of the warrant, when executed, the justice must proceed as follows. If it appear that the goods brought before him were not stolen, they are to be restored to the possessor. If it appear that they were stolen, they are not to be delivered to the owner, but deposited in the hands of the officer who executed the warrant, to the end that the party from whom they were stolen may proceed to indict and convict the offender, and thereupon to have restitution of them.* If it appear that the goods were not stolen, the party in whose possession they were found is to be discharged. If the goods were stolen, but not by him, but by another who sold or delivered them to him, and he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence against him that sold them; but if it appears that he was knowing that they were stolen, he ought to be bound over to answer as an accessory after the fact.† The learned reader will find a most able and excellent discussion of the subject of search warrants, particularly upon the illegality and danger of them, when general, as to the place, parties, and object of them, in 11 State Trials, p. 316. 19, 20.

The protection afforded by law to a magistrate in the impartial execution of this branch of his office, is most ample and satisfactory. No action can be brought against him for any such official act, unless it was dictated by malice, or infected with fraud.

CHAPTER III.

THE ARREST, AND EXECUTION OF THE PROCESS.

THE arrest of a citizen upon a criminal charge, before indictment by the grand jury, is an important branch of the law relative to the punishment of crimes. A security against unlawful arrests is one of the great objects of a free government; and the

* 2 Hale, 151.

† 2 Hale, 251.

due regulation of them in cases where the public peace and the safety of individuals require them to be made, is essential to the administration of public justice. The law upon this subject is more immediately applicable to the duty of the officers who execute the precepts of the magistrate. Yet these duties are so constantly connected with those of the magistrate, that he ought to be well instructed in the law by which both of them are regulated. The several treatises upon the office and duty of justices of the peace, probably for that reason, contain a minute statement of the law concerning arrests. It is, however, with diffidence suggested, that in some of them, the different duties and powers of the magistrate and the officer are not so distinctly separated as they might be. The law relative to the execution of a precept by the officer, is so distinct from that which relates to the authority of the magistrate by whom it is issued, that it is extremely inconvenient and embarrassing, that they should be blended. Accordingly it will appear, that much of the matter to be found in the treatises upon this subject, under the head of *arrests*, is transferred to the preceding chapter, upon the duties of a justice in receiving and conducting applications for process. What follows in this chapter is generally, though not exclusively, applicable to the duty of officers in making arrests, the safe keeping of their prisoners, and their general duty in the execution of the process.

An arrest in criminal cases is the apprehending or detaining of the person, in order to be forthcoming to answer to a crime alleged against him, or of which he is suspected to be guilty.* To this arrest, all persons, without distinction, are liable, when accused of a capital or other crime. But no man is to be arrested, unless charged with such a crime, as will justify holding him to bail when taken.† The exemptions, which exist in civil cases, here cease to operate. Thus a married woman, when she has committed an offence, for which she is subject to punishment, is liable to be apprehended.‡

*1 Chit. C. L. 12; Burns J. "Arrest;" 4 Blac. Com. 286.

†4 Blac. Com. 286; 6 Mass. Rep. 238, *Commonwealth v. Cheney*.

‡1 Chit. C. L. 12; Hawk. b. 1, c. 1.

There has been a decision in Massachusetts,* founded, it is presumed, upon the principle of the common law above quoted from Blackstone's Commentaries. No authority is referred to in the case, either by the counsel, or the Chief Justice in delivering the opinion of the court. But as it settles the law in this state, and if found to be supported by the principles and reasoning of the court, may be of extensive operation as to a class of offences falling within the grounds of the decision, it will be here particularly stated. The law established by this decision is, that a justice of the peace cannot hold one to bail for an offence which may by law be prosecuted *qui tam*, as well as by indictment. And it follows as a necessary consequence, that no person is liable to an *arrest, before indictment found*, in any such case. Chief Justice Parsons states, "that the statute creating the offence,† had so appropriated the forfeiture and prescribed the mode of recovering it, as by necessary implication to exclude the offence. The offender may be prosecuted either by indictment or by information *qui tam*; and whichever prosecution is first commenced, to that shall the offender answer; and he is not liable to answer afterwards to the other. The prosecution by information is commenced by filing the information, and the prosecution by indictment, by the finding of the indictment. No man is liable to imprisonment, or to find bail to answer to the Commonwealth, unless, when he shall appear to answer, the Commonwealth shall have an indefeasible right to prosecute him. This principle applies to this case. If this offence should be supposed to be within the statute, then, when the defendant had recognised, or been imprisoned for want of sureties, a common informer might afterwards have filed his information, and defeated the Commonwealth of its right to compel the defendant to answer to an indictment found after the filing of the information. An information might also have been filed before the complaint was made to the justice; and as process might not have been served, neither the justice nor the defendant could regularly have any knowledge of it; and the justice might have proceeded to imprison the defend-

* 6 Mass. Rep. 348, *Commonwealth v. Cheney*.

† Stat. of 1788, c. 51.

ant for want of sureties, when no prosecution could have been had by the Commonwealth. The statute of 1783 cannot comprehend offences which may be prosecuted, as well by action or information *qui tam*, as by indictment, and when the regular commencement of the *qui tam* prosecution will defeat a prosecution by indictment subsequently commenced." This is an important decision, and applies to all the cases, such as usury, &c. when the mode of recovering the penalty upon penal statutes, is either by action *qui tam*, or by indictment; in which cases it might be erroneously supposed that the offender is liable to be arrested and held to bail.

Neither in this country nor in England, is there any exemption from arrest in cases of treason, felony, or breach of the peace. The difficulty which heretofore existed in the latter country, in precisely ascertaining in what cases a party might be apprehended before a bill of indictment was found against him, arising from the construction of that part of magna charta, which provides that no one shall be taken or imprisoned but by the lawful judgment of his peers or by the law of the land, seems to have subsided. It is said to be now fully settled, that in all criminal cases and accusations, the party may be arrested on suspicion before any indictment is found against him.* In Massachusetts this authority, as we have seen,† is expressly given by statute.

These remarks apply, however, in their full extent, only to arrests made by virtue of the warrant of a magistrate. For it is laid down, that no person can, in general, be taken into custody, without warrant, for a mere misdemeanor, unattended with violence, as perjury or libel.‡ The law which permits or requires an arrest by virtue of a warrant from a magistrate seems to need very little explanation, as to the authority which it confers. The mode of executing it, and the duty of the officer under it, are subjects of particular importance. But as cases exist, in which, by the common law, both officers and private persons are authorized or commanded to make arrests *without warrant*, that subject is now to be considered.

* 1 Chit. C. L. 18; 2 Hale, 72, 108; 4 Bla. Com. 290; Hawk. b. 2, c 12, 13; S. 11 & 18.

† Ante, p. 17.

‡ 1 Chit. C. L. 15; 2 Wils. 159, 160.

The statute of Massachusetts of 1795, chap. 68, empowering justices of the peace, in the absence of the sheriff, deputy sheriff, and constables, to cause offenders to be apprehended for breaches of the peace upon view thereof, is expressed in rather ambiguous terms. The arrests which are contemplated in that statute, must be supposed to be made without warrant; but as it rarely happens, that the authority therein conferred, is exercised from a necessity which sometimes attends the commission of capital or other atrocious crimes, viz. to prevent the escape of the offenders, by immediate arrests without warrant, the statute seems to require no particular explanation.

It is very clear, that by the common law, arrests may be made in certain cases, as well by justices of the peace and other officers, as by private persons, without a warrant. It is equally clear, that this power ought never to be exercised but in cases of necessity. But where a felony has been committed, or a dangerous wound given, and there is great danger that the offender may escape before he can be apprehended by legal process, it is the right and the duty of every citizen, to exert this power. Accordingly it has been so exerted from the early periods of the common law.

A justice of the peace has this power; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace, in his presence.* He has a double power in relation to the arrest of felons; one upon complaint of another person, the other, primitive and original in himself. He may command any person verbally to apprehend a felon, and such command is said to be a good warrant without writing; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in due course of law to apprehend the malefactor. It is also stated to be law,† that any justice or sheriff may take of the county, any number that he shall think fit, to pursue arrest, and imprison traitors and felons, or such as break or go about to break the

* 4 Bla. Com. 289; Stat. of Massachusetts, 26th Feb. 1796.

† 1 Chit. C. L. 25; Dalt. J. 171; See also, Laws of Mass. of 26th Feb. 1796, as to aid in criminal cases.

peace ; and that every man being required, ought to assist and aid them on pain of fine and imprisonment. Where the magistrate is not present at the commission of a crime, he ought not, upon mere discretion, to send the party accused to prison, unless it be upon due consideration of evidence produced before him. How far the doctrine above laid down, as to the power of a justice to arrest without warrant, is reconcileable with that of Chief Justice Pratt, in the case of the *King v. Wilkes*,* the reader will judge. His doctrine in substance is, that if a magistrate has knowledge of an offence, yet that is not sufficient ground for him to commit the criminal ; but in that case, he is rather a witness than a magistrate, and ought to make oath of the fact before some other magistrate, who should thereupon grant a warrant to apprehend the offender.

Sheriffs are not only authorized, but enjoined to arrest felons ; and all persons are required to be assisting to them therein, and are punishable by fine and imprisonment in case they neglect their duty. The sheriff may also arrest a person suspected of a capital offence, whose guilt is not certain.† This power in the sheriff and other officers to make arrests without warrant, is derived from the ancient statutes of England ; which were dictated or rendered necessary, by the then unsettled and conflicting state of society and government in that nation. If such a power now exists in these officers, in our governments, it ought to be exerted with the greatest caution and only under the most pressing circumstances ; for it is altogether adverse to the spirit and genius of the American governments, in the present state of their well adjusted powers and provisions, that any man's liberty or safety should be invaded or restrained, either by public officers or private citizens, without the interference of lawful authority.

Though a coroner has not the power of taking inquisitions of felony, except in case of death, yet by the common law, he is a conservator of the peace in relation to all felonies, and may arrest, or cause another to arrest a felon.‡

* 2 Wils. 158, ante, p. 9.

† 1 Chit. C. L. 25 ; 2 Hale, 87.

‡ 1 Chit. C. L. 26 ; 2 Hale, 88.

The office of constable, by the common law, is either ministerial, in obeying warrants and precepts of justices of the peace &c., or is original, as a conservator of the peace at common law and by virtue of ancient statutes.* By the original and inherent power which he possesses, he may apprehend the offender, in cases of felony and other aggravated or capital offences, committed in his view, by virtue of his office, and without warrant.† In general when any affray takes place in his presence, he may either keep the parties in custody till it is over, or he may carry them immediately before a magistrate.‡ He has at least an equal power to apprehend with any individual, and the chief difference between his power and duty, and that of a private person, seems to be, that the former has a greater authority to demand the assistance of others, and is liable to a severer fine for any neglect of duty ;§ and that he ought to bring the party suspected before a magistrate to be examined. In general, a constable cannot, any more than an individual or private person, of his own accord and without warrant, justify the arrest of a supposed offender, upon suspicion of his guilt ; unless he can show that a felony has been committed by some person, and the reasonableness of the suspicion that the party arrested is guilty.|| There are however authorities in favor of an exception to this rule, in the cases of night-walkers, and persons reasonably suspected in the night time, of felony.¶ And by modern English statutes, not in force in this country unless they may have been adopted, other powers are given to constables and other peace officers to apprehend persons reasonably suspected of carrying stolen goods in the night time, reputed thieves, &c. If there be any affray, the constable may, either to prevent it, or in the time of the affray, upon information or complaint, arrest the offender ; but if the affray be past, and there is no danger of death, the constable cannot arrest the parties without a warrant from a justice of the peace.** Where a felony has been committed, it is agreed

* 1 Chit. C. L. 26 ; 2 Hale, 88. † Ib. ‡ Ib. § Ib. ; Hawk. b. 2, c. 13, s. 7. || 4 Esp. Rep. 80 ; Hawk. b. 2, c. 12, s. 16 ; 2 Hale, 92, 89.

¶ 1 Chit. C. L. 21 ; 1 East, P. C. 303 ; Hawk. b. 2, c. 12, s. 20 ; 2 Hale, 89.

** 2 Hale, 90.

that a constable may, *ex officio*, arrest and imprison the felon, till he can be conveniently conveyed to a justice of the peace, or the common gaol; and it is also agreed, that he may break open doors to take the felon, if he be in the house, and his entry denied after demand, and notice that he is a constable—and the reason is, that he is *ex officio* a conservator of the peace, and is not only permitted, but by law *enjoined*, to take a felon; and if he omits his duty in this respect, he is punishable for such neglect.* But there must be a felony done, and the constable must be ascertained of the fact.

In cases where a felony is not yet committed, but there is danger of its being committed, as if A hath wounded B, so that he is in danger of death, and A flees and takes refuge in a house and shuts the doors, and will not open them, the constable may break the doors of the house to take him, if upon demand he will not yield himself.† If there be any affray in the house where the doors are shut, whereby there is danger of blood-shed, the constable, after demanding entrance, if refused, and the affray continue, may break open the doors to keep the peace and prevent danger.

When the constable has thus arrested his prisoner, it is the safest and best way in all cases to bring him to a justice of the peace, that he may be bailed, committed, or discharged, as the case may require.‡ If the prisoner be sick, the constable may keep him as long as the necessity of the case requires, in a house, till he can with safety or convenience convey him to a justice of the peace.§

Watchmen, by ancient statutes, and the common law, may arrest offenders, particularly night-walkers, and commit them to custody till the morning.|| But neither they, nor any peace officer, are justified, at common law, in taking up a night-walker, unless he has committed some disorderly or suspicious act.¶ A watchman, having apprehended a party, may discharge himself by de-

* 2 Hale, 91.

† 2 Hale, 94.

‡ 2 Hale, 95.

§ Ib.

|| 4 Bla. Com. 289; 2 Hale, 88, 96.

¶ Bac. Abr. Trespass. D. 3; 2 Ld. Raym. 1301.

livering him to a constable, or he may take him before a magistrate himself.*

By a statute of Massachusetts of 1796, chap. 82, watchmen are authorized "to see that all disturbances and disorders in the night be prevented and suppressed; and to examine all persons whom they shall see walking abroad in the night after ten o'clock, and whom they shall have reason to suspect of any unlawful intention or design, of their business abroad at such season, and whither they are going; and in case they give not reasonable satisfaction therein, then to secure by imprisonment or otherwise, all such disorderly and suspicious persons, to be safely kept until morning, then to carry them before the next justice of the peace to be examined and proceeded against according to the nature of their offences, as by law directed."

There was anciently another mode of arrest, without warrant, that of hue and cry; which was authorized in the most ancient periods of the common law, in cases where persons were suspected of felony, or having inflicted a wound, from which death was likely to ensue. The practice is said to be distinctly recognised in the institutions of Alfred. The power incident to this practice was conferred by ancient statutes. The nature and origin of it, the manner in which it was to be levied, and what might be done under it, may be found in the English law writers.† But as the practice is not in use in this country, and has become obsolete in England, a particular statement of the cases under it, in which an arrest may be made, without warrant, cannot be necessary. Indeed it seems apparent, that all the authority necessary for the apprehension of offenders without warrant, in cases of immediate necessity, is vested in public officers and private persons; it might appear ludicrous at the present day to pursue an offender with "horn and voice, and by foot and horse."

Any private person, as well as a peace-officer, who is present when a felony is committed or a dangerous wound given, is authorized by the law to arrest the felon, unless he were under age at the time; and they may justify breaking open doors, upon fol-

* 1 Chit. C. L. 24; Dalt. J. c. 104.

† 1 Chit. C. L. 29; 2 Hale, 99; 4 Bla. Com. 294.

lowing such felon.* Upon probable suspicion also, a private person may arrest the felon ; but in this case, he cannot justify breaking open doors to do it ; because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person, unarmed by any legal power, might break open a house ; and because also such arrest by a private person on suspicion, is barely *permitted* and not *enjoined*, as in the case of those who are present when a felony is committed. Every private person is bound to assist an officer demanding his aid in the taking a felon or the suppressing an affray. Where such arrests are made by private persons upon suspicion, there must be reasonable and probable ground for it ; and it is essential to the justification of such private person, that a felony has actually been committed by some one. In such case, the person will not be liable to an action, though it should afterwards be proved that the party imprisoned was innocent.†

In order to prevent the commission of a crime, any person may lawfully lay hold of a lunatic who is about to commit any mischief, which if committed by a sane person, would constitute a criminal offence ; and he may do the same to any other person whom he shall see on the point of committing a felony, or doing any act which will manifestly endanger the life or person of another ; and may detain him until it may be reasonably presumed that he has changed his purpose ; but where he interferes to prevent others from fighting, he should first give express notice of his intention to prevent the breach of the peace. It is every man's duty to interfere for the preservation of the peace, and to arm himself for that purpose.‡

Thus any one may justify breaking and entering a party's house and imprisoning him, to prevent him from murdering his wife, who cries out for assistance ; but it is always more safe to obtain a warrant when time will allow ; because where there is a warrant, no action lies, unless there was want of probable cause, and the process maliciously obtained.

* 11 Johns. Rep. 486, *Phillips v. Trull*.

† 4 Bl. Com. 289, 290 ; 1 Chit. C. L. 17 ; 6 Binn. Rep. 316 ; 11 Johns. Rep. 486.

‡ 1 Chit. C. L. 18 ; 1 East, P. C. 304.

A private person, who has apprehended another for felony, may deliver the prisoner into the hands of a constable, or, as it is said, carry him to any gaol in the county; though that is rarely done.* But the most advisable course seems to be, to cause him, as soon as convenience will permit, to be brought before a magistrate, to be examined, bailed, or committed to prison.† And where a private person has apprehended another in the case of an affray, he may lawfully detain him till the heat is over, and then deliver him to a constable.

By the act of congress of April 30th 1790, it is provided, that suits against ambassadors and other public ministers, their servants or domestics, shall be adjudged void. Laws U. S. vol. 1. p. 110.

No authority exists to arrest persons who have committed crimes in a foreign country; but persons who have committed crimes upon the high seas are amenable to the laws of the United States when they return to, or are found therein.

In Pennsylvania an arrest may be made for felony without warrant, and a private person may make it at his peril; but *quære*, if he can arrest for misdemeanor, or receiving stolen goods. *Wakely v. Hart*, 6 Binn. Rep. 316.

In New York a private person cannot of his own authority arrest a person who has been engaged in an affray or breach of the peace. 11 Johns. Rep. 486. But during an affray, any person may, without warrant from a magistrate, restrain any of the offenders in order to preserve the peace. *Ibid.*

All persons whatsoever who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offenders. *Ibid.*

The *execution of the warrant* is an important part of the law relative to arrests. The officer to whom it is directed must proceed with secrecy to find out and actually *arrest* the party; not only in order to secure him, but also to subject him and all other persons to the legal consequences of escape and rescue. But in many cases, for common assaults, it may not be inconsistent with an officer's duty to give notice to the parties accused, of the

* 1 Chit. C. L. 20.

† 1 Hale, 589; 11 Johns. Rep. 486, *Phillips v. Trull*.

time when they must go before the magistrate, in order that they may be provided with sureties.

To constitute an arrest, the party against whom the process is issued, must be actually touched by the officer (who should accompany it with pronouncing words of arrest), or confined in a room, or submit himself by words or actions to be in custody. If he be not taken into actual custody, it will not amount to arrest; for bare words will not in this respect be of any avail.* If a warrant be generally directed to all constables, no-one can act under it, out of his own precinct; but if it be directed to a constable by name, he may, by the common law, execute it any where within the jurisdiction of the justice by whom it was granted, because a justice at common law may direct his warrant to any person he may think fit; in which case, by the express nomination of the party, his authority becomes co-extensive with that of the magistrate.† In Massachusetts, however, it will be recollected that this principle of common law has been changed by the decision in the case of the *Commonwealth v. Samuel Foster & al.*‡

A warrant directed to several, may be executed by one; but if it be directed to them jointly and not severally, they must all be present at the arrest. And when the officer employs others to assist him, he must be so near as to be acting in the arrest in order to render it legal;§ and he may not only demand the assistance of the people in general; but may, if the warrant cannot be otherwise executed, engage the assistance of the military.||

The arrest may be made in the night, and on the Sabbath. Arrests under the service of precepts prohibited on that day, relate only to civil processes. They may be made at all times for felonies and breaches of the peace.¶ By a statute of Massachusetts of 1791, chap. 58, the service of any civil process is prohibited on the Lord's day; and enacts that such service shall not only be void, but the person serving the same, shall be liable

* 1 Chit. C. L. 48; 1 East, P. C. 330.

† 1 Chit. C. L. 48.

‡ 1 M. R. 488, 2d edit; 1 Chit. P. C. 48, 49; 1 East, P. C. 130.

§ Cowp. 66. || 1 Chit. C. L. 48, 49; 14 East, 190. ¶ 1 East, P. C. 324.

to damages in the same manner as if he had done the same without any such civil process. On the construction of the British statute of 29 Car. 2, which is similar in this respect to that of Massachusetts, it has been decided, that a person may be apprehended on Sunday on an attachment for a rescue; and as no time is prescribed in the warrant, it continues in force till fully executed; and a person may be twice apprehended under it, if the purposes of justice have not been effected.*

It is laid down that officers, if commonly known to be such, and act within their own precincts, need not show their warrants to the parties whom they come to apprehend, notwithstanding they demand the sight of them; but that all persons making arrests ought to acquaint the party whom they are to apprehend with the substance of their warrants. But it is enjoined on all private persons who may be authorized to execute a warrant, and even officers, if they are not commonly known, or if they act out of their precinct, to show their warrants, if demanded.† Of late, the doctrine that even a known officer is not obliged to show his authority when demanded, has been considered as dangerous; because it may affect the party criminally, in case of resistance.‡ Lord Kenyon observed, that he did not think a person is bound to take it for granted, that another who says he has a warrant against him without producing it, speaks the truth; it is therefore very important that in all cases where an arrest is to be made by virtue of a warrant, that it should be produced, if demanded, so as to leave a delinquent no excuse for resistance.§ By a decision in Vermont, a sheriff is not obliged to show his precept, either to the person who is to be arrested by it, or to the bystanders.|| But Lord Hale observes, that it is reasonable and also safe for the officer to acquaint the party for what cause he is arrested; for it is a great security to the officer, and but just for the party arrested to know the cause of his arrest.

* 1 Chit. C. L. 48, 49; Peake's Rep. 234.

† 1 Chit. C. L. 50, 51; Hawkins, b. 2, c. 13, s. 28; 2 Hale, 116; 1 East, P. C. 312, 314; 319.

‡ 8 T. R. 188.

§ 1 Chit. C. L. 51.

|| 2 Tyler's Rep. 214.

In what cases doors may be broken open in furtherance of the purposes of justice, are questions of great delicacy and importance, in relation to the execution of warrants, and the apprehension of criminal offenders. A knowledge of the law, as it concerns the powers and duties of officers in these cases, becomes more important and necessary from the circumstance, that the most eminent writers upon the criminal law have differed in their opinions upon the subject.

The first general principle is, that no man's house or castle can be violated with impunity, excepting those cases only where absolute necessity compels the disregard of inferior rights, in order to secure public benefit ; and therefore in all cases where the law is silent and express principles do not apply, this extreme violence is illegal.* And this principle is carried so far in the civil law, that for the most part, not so much as a common citation or summons, much less an arrest, can be executed upon a man within his own walls.† There is a distinction between the powers of officers and private individuals in this respect. For it is said that the former, being enjoined by law to apprehend a party suspected, may be justified in breaking open doors to apprehend him, on mere suspicion of felony ; and will be justified, though it appear that the suspicion was groundless ; but a private individual acts at his own peril, and if the party be innocent, would be liable to an action for breaking open doors without warrant.‡

The reason of this difference between the arrests of private persons and officers, upon suspicion only, is, that in the former case, the arrest upon suspicion is only permitted ; and if omitted, is not punishable ; and therefore they are not permitted to break open doors ; but in case of officers, they are punishable, if they omit this duty. Another and sufficient reason arises from the great inconvenience and danger of admitting every private man, upon pretence of suspicion, to break open houses ; whereas officers, and the authority with which they are clothed, are publicly known and presumed to be sufficient.§

* 1 Chit. C. L. 52.

† 3 Bla. Com. 288.

‡ 2 Hale, 82.

§ 2 Hale, 92.

It is a principle of law so clearly settled as that no doubt or fear need be apprehended concerning it, that when it is certain a felony has been committed, or a dangerous wound given, and the offender, upon pursuit, takes refuge in his own house, either a constable, or other peace officer, or any private individual, may, without warrant, break open his doors, if refused admittance after proper demand.* And when an affray is made in a house, in the view or hearing of a peace officer, he may break open the outer door in order to suppress it.† So in some extreme cases it has been holden, that a private individual may break and enter the house of another, to prevent his murdering one who cries out for assistance.‡ But it is doubted whether this power extends to an officer or private person when felony is only *suspected*, and has not been committed *within the view* of the party making the arrest. It is said to be certain that an officer may break open doors, upon the positive information of another who was actually a witness to the felony;§ and a marked distinction between the power of officers and private individuals, is, that the latter can act only on their own knowledge, while the former may proceed on the information of others. A peace officer may justify an arrest on a reasonable charge of felony *without a warrant*, although it should afterwards appear that no felony had been committed; but a private individual cannot.|| We may therefore take it as settled law, that a private person may break open doors after a proper demand and notice, when he is certain that a felony has been committed; and that a constable may do the same upon the information of the party in whom the knowledge, or reasonable, suspicion exists.¶

As to the question, how far doors may be broken open *upon suspicion* of felony, there is a difference of opinion among the writers upon this branch of criminal law. Lord Coke was of

* 1 Chit. C. L. 52, 53; 1 Hale, 588, 589; Hawk. b. 2, c. 14, s. 7; 2 Hale, 82, 83, 88, 96.

† 2 Hale, 95; Hawk. b. 1, c. 63; b. 2, c. 14.

‡ 1 Chit. C. L. 53; 2 B. & P. 260.

§ 1 Chit. C. L. 53; 1 Hale, 589; 2 Hale, 92.

|| Dougl. 358.

¶ 1 Chit. C. L. 53.

the opinion, that this might be done by the party originally suspecting, but by no other, unless by the constable in his presence.* Lord Hale positively lays it down, that doors may be broken open without warrant, on *suspicion* of felony.† East contradicts this, in express terms; and contends, that though a felony has been committed, yet a bare suspicion of guilt against the party will not warrant the breaking open of doors, unless the officer be armed with a *magistrate's warrant*, grounded on suspicion; but qualifies it by observing, that it will at least be at the peril of proving, that the party so taken on suspicion was guilty.‡ This opinion of East is adopted from Foster, by whom the doctrine is laid down in the words used by Mr. East, but without the qualification added by him.§ Hawkins, in his modest language, expresses the same opinion, and observes, that “it seems the better opinion at this day, that where one lies under a probable suspicion only, no one can justify the breaking open of doors in order to apprehend him.”|| Upon the whole it seems to be understood, that to justify breaking open doors without warrant by a private individual, he must prove the actual guilt of the party arrested; but that an officer acting *bonâ fide*, on the positive charge of another, will be excused, and the party making the accusation will alone be liable. But the breaking of an outer door, is in general so violent, obnoxious, and dangerous a proceeding, that it cannot be adopted with safety or impunity except in extreme cases, where an immediate arrest is indispensable.¶

In what cases doors may be broken open in order to execute a warrant from a justice of the peace, is next to be considered. And it is laid down in Chitty's late treatise upon criminal law, that in all cases, doors may be broken open, if the offender cannot otherwise be taken, under a warrant for treason, felony, suspicion of felony, or actual breach of the peace, or, to search for stolen goods. And of course that the warrant is a complete justification to the person lawfully executing it, even though the party accused should prove his innocence.** But it is to be

* 4 Inst. 117. † 1 Hale, 583. ‡ East, P. C. 322. § Fost. 321.

|| Hawk. b. 2, c. 14, s. 7. ¶ 1 Chit. C. L. 54; Dougl. 358.

** 1 Chit. C. L. 54.

remembered, that in every case where doors may be broken open in order to make an arrest, whether in criminal or civil cases, there must be due notice first given by the officer of his business, a demand of admission, and refusal, before the parties concerned can proceed to that extremity.* In support of the general position above laid down, it is stated by Lord Hale, that if the warrant be for felony or the surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting him with the business and demanding the prisoner, he refuses to open the door; and this he says was the constant practice in his time, against the opinion of Lord Coke. And the law, he says, is the same, if the warrant be only upon suspicion of felony.† It is also laid down in Hawkins,‡ that doors may be broken open where one known to have committed a felony, or to have given a dangerous wound, is pursued, either with or without warrant. And in East's Pleas of the Crown,§ it is said that where a felony has been committed, or a dangerous wound given, the party's own house is no sanctuary for him, but the doors may be forced, after notification, demand, and refusal. It is added in Chitty, that on a warrant for treason, felony, or breach of the peace, the doors of the party accused may be broken open, if admittance cannot otherwise be obtained,—“but there seems no well-founded authority for extending this right to misdemeanors unaccompanied by violence.” For this last remark, no authority is quoted. If it be well founded, it will have a very extensive application in this country, where many of the most pernicious crimes are punished as misdemeanors only, and which from their nature are “unaccompanied with violence.” Such as forgeries, counterfeiting, cheats of every description, all crimes of omission, perjuries, &c. and others, the perpetration of which cannot be accompanied with actual force or violence, and which need not be alleged to be committed *vi et armis*. It may be added, that the position seems to be repugnant to the authorities upon this point. For it is laid down in Hawkins,|| that doors may be broken open to execute a *capias*, grounded upon an indictment for any

* Foster, 320.

† 1 Hale, 582, 583.

‡ Hawk. b. 2, c. 14, s. 7.

§ 1 East, P. C. 322.

|| Hawk. b. 2, c. 14, s. 3.

crime whatsoever. There is the same reason for extending this power to all cases under a warrant from a justice of the peace, for offences within his jurisdiction ; and also to all cases in which he is authorized by law to issue his warrant to apprehend the offender and secure him for trial. And the position seems also repugnant to a subsequent remark by Chitty, "that this power is permitted wherever the crime is of a public nature."* The case referred to in support of this last remark, is that of *Sir Francis Burdett v. Abbot*,† which also clearly establishes the power of breaking open doors, after demand and refusal of admittance, in cases "unaccompanied with violence." In that case the domicile of Sir Francis was forcibly entered, upon a *capias* from the speaker of the House of Commons for a libel upon the House, and for a contempt of its authority and privileges, neither of which offences was accompanied with actual violence.

Indeed in that case the process was not even in the name of the king, but of the speaker himself in his official capacity ; and it appears by the numerous authorities quoted, and the elaborate arguments made use of in that case, that if the prosecution be for a matter of general concern, in which the public at large have an interest, the public interest and safety are to be preferred to the privileges of the individual. And the general current of authorities seems to be, that this privilege is confined to the execution of civil processes merely, in which the public have no special interest ; and that in all criminal prosecutions, the house of the party is no sanctuary for him ; but that the doors may be forced, after such notification, demand, and refusal, as the law renders necessary.‡

This power of breaking open doors in cases which are permitted by law, is one which will not admit of any extension. It is therefore confined, even in civil cases, to *outward* doors and *windows* only ; such as are intended for the security of the house against persons from *without*, endeavouring to break in. For if the officer find the outward door open, or it be opened to him from within, and he enter that way, he may then break open any

* 1 Chit. C. L. 55, 56.

† 14 East, 116.

‡ 1 East, P. C. 322.

inward door, if he find that to be necessary to execute his process.*

This privilege of a man's castle from an outward breach, extends only to those cases where the *occupier or any of his family*, who have their domicile or 'ordinary residence there, are the objects of the arrest ; for if a stranger, whose ordinary residence is elsewhere, upon pursuit, take refuge in the house of another, such house is no castle of *his*, and therefore he cannot claim the benefit of sanctuary in it. It must be observed however, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him ; unless, as it seems, where the parties act under the warrant of a magistrate.† And if a man who is legally arrested escape from the officer, and take shelter in the house of another, or even in his own house, the officer, upon fresh suit, may break open the door in order to retake him, having first given due notice of his business, and demanded admission and been refused. But if it be not upon fresh suit, it seems the officer should have a warrant from a magistrate.‡ And in all cases, if the officer, or his assistants, having entered a house in the execution of their duty, be locked in, they may justify breaking open the doors to regain their liberty ; and this right extends to officers and their friends and assistants, in the execution even of a civil process. So a sheriff may break open the doors of a house to rescue his officers unlawfully detained within it.§

In giving notice of the business and authority of the officer, and in demanding admission into the house, before he proceeds to break open doors, no precise form of words is required to be used. It is sufficient if the party be informed that the officer does not come as a mere trespasser, but claims to act under proper authority, provided the officer in fact had a legal warrant. And where the magistrate has power to issue the warrant, the

* 1 East, P. C. 323 ; Cowp. 1, *Lee v. Gansel* ; Leach, 106, 181, *Baker's case*.

† 1 East, P. C. 324 ; Fost. 321. ‡ 1 East, P. C. 324 ; Fost. 320 ; 1 Hale, 459.

§ 1 East, P. C. 324 ; 1 Chit. C. L. 57.

legality of it will never depend upon the truth of the information upon which it is granted.*

Upon *search-warrants*, regularly granted, and specifically directed, it seems to be settled, that after proper precaution, the house to be searched may be broken open, and whether the property be found there or not, the officer and his assistants will be excused. But the party maliciously procuring a search-warrant, and causing it to be executed, will be answerable to the party aggrieved in an action on the case.† If the goods be not in the house, yet the officer is excused who breaks open the door to search for them, because he acts under the authority of a warrant, and could not know whether the goods were in the house or not till search was made; but it seems the party who made the suggestion and procured the process, is liable in such case; for as to him, the breaking of the door is lawful or unlawful according to the event; *viz.* lawful, if the goods are there; unlawful, if not there.‡ The general doctrine to be adduced from all the books relative to the execution of search-warrants, is, that if they be altogether illegal, the officer cannot be justified; but that if they are legal in form, though improperly granted, he may safely break open the doors to execute them, whether his search succeed, or the charge be malicious or mistaken.§

By a statute of Massachusetts passed June 14th 1823, an important and necessary provision is made, authorizing search-warrants to be issued to search for counterfeit money and securities, and for tools, implements, and materials used for forging them. The statute is as follows—"That all justices of the peace, and courts who now by law have power and authority to issue or grant search-warrants to search for articles alleged to have been stolen, shall have like power and authority to issue warrants to search for money or other securities alleged to be forged or counterfeited, and for any tools, implements, or materials used or to be used in the making, forging, or counterfeiting the same."

* Fort. 136, 137; Hawk. b. 2, c. 14, s. 1, note 1.

† 1 Chit. C. L. 57.

‡ 2 Hale, 151.

§ 1 Chit. C. L. 57.

See post Part II, as to the forms of search-warrants, and the remarks upon the construction of this statute there inserted.

The house of a third person, as we have seen, is not privileged, if the offender fly to it for refuge ; but may be broken open after the usual demand. But then it is said to be at the peril of the officer, that the party against whom the warrant is obtained be found there, for otherwise he will be a trespasser. It is proper to observe, that all the privileges attendant on private dwellings, relate to arrests *before indictment* ; for there is no question whatever, that after indictment found, a criminal of any degree may be arrested in any place, and that no house is a sanctuary for him. It has been before stated, that after a party has been once actually arrested, and escaped from custody, any door may be broken open to retake him, after proper demand of admittance. And when the officer has once entered the house, he may, after demand and refusal of admittance, break open any inner door that obstructs his progress.*

The next consideration is, what does the duty of the officer, or party making the arrest, require him to do, after he has made the arrest ? This duty seems to be clearly explained in the books ; when the officer has made the arrest, he is forthwith to bring the party to the justice, according to the import of the warrant. If the time be unseasonable, as in the night ; or if there be danger of a rescue ; or if the party be sick, and not able at present to be brought, he may be secured in a house till the next day, or for a further time, if reasonable and necessary. And when the party is brought before the justice, by the officer, he is in law still in his custody, till the justice either discharge or bail him, or till he be actually committed to gaol by warrant from the justice.† And if the officer be guilty of unnecessary delay, in bringing the party arrested before the justice, it will be a breach of duty, both as it respects the party himself, who is entitled to a prompt discharge, if innocent ; and as it respects the government, at whose expense he is unnecessarily detained in custody.

It is said that when arrest has been made without warrant, the

* 1 Chit. C. L. 57 ; Hawk. b. 2, c. 14, s. 8.

† 2 Hale, 119.

constable may, in some cases, take the party's word for his appearance before the magistrate ; and that this is usually done where the charge is for an assault of a trifling nature, and the defendant is of good repute, and there is no probability of his absconding. But if a constable, having arrested a party under a warrant, suffer him to go at large, upon his promise to surrender himself and find sureties ; the better opinion is that he can afterwards arrest him upon the same process ; because as the public are interested in the offender's being brought to justice, there can be no well founded objection to such second arrest. And if the party voluntarily return and put himself again under the custody of the officer, the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. Sergeant Hawkins, however, seems to express a doubt as to the power of the officer to make a second arrest upon a warrant against a party, whom he has once permitted to go out of his custody.* But it is said to be certain, that if the escape be made without the consent of the officer, the defendant may be retaken as often as he flies, upon fresh suit, although he were out of view, or had reached another county or district.†

If the warrant be to bring the party before the justice who issued it, then the officer is bound to bring him before the same justice ; but if the warrant be to bring him before any justice, then the power of election is vested in the officer, and not in the prisoner, and the officer may proceed to any magistrate who has jurisdiction within the county.‡ If the warrant be in itself defective, or if it be executed out of the jurisdiction, or the wrong person be taken under it, the party may legally resist the attempt to apprehend him ; and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose.§ But if, when a man is apprehended and in the custody of officers of justice, a third person espouses his cause, and encourages the prisoner to resist, the officer may imprison the third person thus opposing the operation of justice.||

* Hawk. b. 2, c 12, s 9 ; 1 Chit. C. L. 60 ; Bac. Abr. Constable D.

† 1 Chit. C. L. 60 ; Dalt. J. 169.

‡ 5 Co. 59, b. 1 ; Hale, 582.

§ 1 East, P. C. 310, 325, 395 ; Fost. 312. || 1 Chit. C. L. 61 ; Peake's Rep. 89.

When there is a rescue, it is necessary that the person making the rescue should have knowledge that the person he sets at liberty has been apprehended for a criminal offence, if he be in the custody of a private person ; but if he be under the care of an officer, then he is to take notice of it at his peril.* The mere prevention of the arrest of a person who has committed a felony, is only a misdemeanor ; but if the party be actually taken and then rescued, if the arrest be for felony, the rescuer is a felon, and if for a misdemeanor he is liable to the same punishment as if he had committed the original offence. When the offender has escaped, or is rescued, the justice may grant a fresh warrant, reciting the former proceedings, and the escape or rescue, and directing the apprehension of the offender.† And if in such case the justice's warrant should be obtained by unwarrantable practice, and even by perjury, yet the warrant will be legal ; for in cases wherein justices of the peace have jurisdiction, the legality of the warrant will never depend upon the truth of the information whereon it is grounded.‡

When a party, accused of an offence, is already in prison or in custody, in a civil action, he may be there charged criminally by leaving with the gaoler, or officer, in whose custody he may be, the warrant from the justice ; but such justice cannot take the prisoner out of the custody of the gaoler ; for the prisoner in such case can only be removed by *habeas corpus*. When the party in custody on a civil action is thus to be proceeded against in a criminal prosecution, the practice is, for the magistrate, before whom the complaint is laid, to issue his warrant, and cause the same to be lodged with the keeper of the place of confinement, where the defendant is kept in prison. This officer, (and doubtless any other officer,) on the termination of the civil imprisonment, takes the party before the justice of the peace, by whom he is examined, discharged, bailed, or committed, as on an original accusation. When the party is already in gaol on a criminal charge, and fully committed for trial, it is said not to be

* 1 Hale, 606 ; Hawk. b. 2, c. 21.

† 1 Chit. C. L. 62 ; Foxt. 185.

‡ Foxt. 186, ante.

the English practice to bring him from his first custody before a magistrate, on a subsequent charge;* but the examination of witnesses is taken as in ordinary cases, and a warrant of detainer is sent to the gaoler, in whose custody he remains. But the correctness of this practice, here, may be reasonably doubted. Such an examination and the proceedings consequent thereon, may affect the innocence, personal character, and liberty of the party; and cannot be legally had in his absence, before any tribunal, except that of a grand jury. There appears to be no legal objection or other difficulty in taking such examination in the usual way, and in the presence of the party accused. It may usually be done in some convenient place near to, or in the apartment of the prisoner, during which time the party will be in the actual and safe custody of the gaoler, whose prisoner he may be. If he should be ordered to be committed upon this second charge, he will be remanded; and the process returned to the court before which he is to take his trial; and the several offences for which they may stand committed will thus appear in the callendar of prisoners and their crimes; and if the second offence be for a crime committed in another county, he may be sent there by *habeas corpus* for trial.

CHAPTER IV.

THE EXAMINATION AND TRIAL.

WE have seen that it is the duty of the officer to bring the party accused within a reasonable time after the arrest, before the magistrate, that the case may be examined and the party proceeded with as the law may require.† It then becomes the duty of the magistrate to complete the examination of all concerned and to discharge, bail, or commit the individual charged, as soon as the nature of the case will permit; but he is allowed a reason-

* 1 Chit. C. L. 64.

† 2 Hale, 120.

[illegible]

danger in adopting it. In this, as in all other instances of a justice's official conduct, if he be actuated by an impartial regard to the rights both of the government and the party accused, he will be eventually justified. Notwithstanding the ancient opinions to the contrary, it is said to be the present practice in some of the best regulated police offices in England, to detain prisoners much more than twenty days, between the time of their being first brought before a justice and their commitment for trial, and to bring them up for examination several different days during the interval.*

As to the manner in which the prisoner is to be detained and kept for examination, it was formerly held that a magistrate ought not to detain such a prisoner, in his own house, but should send him to the common gaol of the county; and the reason given for this is, that otherwise, when the justices come to deliver the gaol, he is not in the gaol, and may not be delivered, and therefore may be detained longer than is reasonable.† This reason seems to be unsatisfactory; for it is to be presumed that the magistrate will complete the examination as soon as the circumstances of the case, and his duty, will permit; if this be done before the justices come to deliver the gaol, and the justice orders the prisoner to be committed for trial, he will in that case, as a matter of course, commit him to the county gaol, where the justices, who come to deliver it, will find him. If the examination cannot be completed before the justices come for that purpose, the magistrate need not be compelled to proceed in the examination on that account, before his duty and the circumstances of the prisoner require it. And no other inconvenience can result from allowing the magistrate a reasonable time to complete his examination, than that the prisoner will be held to appear and answer, at a subsequent term of the court, in case the magistrate finally decides not to discharge him. And there may be cases, in which a magistrate would be extremely unwilling to commit a prisoner to the county gaol during the interval of his examination, when he might be kept in safe custody, either in his own house

* 1 Chit. C. L. 73; Dick. J. Examination, 111.

† Cro. Ellz. 830.

or elsewhere. It is probably for these reasons, that Lord Hale has laid down a different rule, *viz.* that because it may be unreasonable to take these examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the examinations can be taken.* And in another place he says, that the prisoner may be committed, by word of mouth, to a constable, to detain him in custody till the next day, if upon a reasonable occasion the justice cannot, at the return of the warrant, take the examination.†

If, when the party is brought before the justice, he finds that it is necessary to inquire further into the case before he discharges or commits him, he may from time to time verbally remand him into custody, and a written warrant or authority is not necessary ; but it is usual, when the party is detained for examination till another day, or for several days, to make out a written warrant for that purpose.‡ This course is convenient, and generally liable to no objection, when the examination takes place in the town or vicinity where the county gaol is situated. But when the gaol is at an inconvenient distance from the place of examination, the prisoner may be ordered into and kept in the custody of the officer, in any other safe and convenient place. The written warrant, in cases of commitment for further examination, need not state the crime of which the party is accused ; for it is observed, that it may not always be safe or proper to let the peace officer know the crime for which he is detained.§ And after the magistrate has determined on committing the party, he may verbally authorize the officer to detain him till he can make out the mittimus.||

By the late statute of Massachusetts, of 1821, chap. 98, a very convenient and proper provision is made, by which justices of the peace are authorized to take the recognisance of a party

* 2 Hale, 120. † 1 Hale, 585.]

‡ 1 Chit. C. L. 73. See the form of commitment for further examination, post, Part 2.

§ Bac. Abr. tit. Trespas, D. 3.

|| 1 Chit. C. L. 73 ; 7 East, 583.

for his appearance before such justices *for further examination*. This statute enacts, that "any justice of the peace, before whom any person is brought on a complaint for any crime, misdemeanor, or other offence, may take the recognisance of such person, with surety or sureties, in a reasonable sum, for his appearance before said justice, for further examination at a future time, not exceeding ten days;" and by the second section of the statute it is further enacted, "that if the person thus recognised shall not appear before said justice, at the time appointed for further examination, as set forth in the recognisance, it shall be the duty of said justice, to note his default upon the record, and certify the same recognisance with the record of the default in the performance of the condition thereof, to the Court of Common Pleas, that a *scire facias* may issue thereon, or an action of debt be brought for the recovery of the penalty." It will be the duty of justices of the peace in carrying this statute into effect, to observe all the directions and cautions, which are hereafter recommended, as to taking recognisances for the appearance of parties at court, both as it respects the amount of the penalty of the recognisance taken for the appearance of the party for further examination, and as to the sufficiency of the sureties in point of property; otherwise this statute may furnish a very convenient mode of escape or avoidance to the criminal.

The magistrate, having authority to examine into the nature and circumstances of a criminal charge against an offender, has also a power as incident to his authority, to bring before him all persons who appear from the oath of the complainant, or from the magistrate's own knowledge, to be material witnesses for the prosecution; and for this purpose may issue his summons, directed to a proper officer, requiring him to cause such witnesses to come before him, and give evidence; or he may (which is the usual course) insert an order to summon the witnesses, naming each of them, at the conclusion of the warrant against the party to be arrested.* And upon the reasonable request of the defendant, the magistrate has a similar power to bring before him any witnesses, whose testimony may be material on his behalf.†

* See form, post, Part 2d.

† Mass. Laws, 1783, ch. 51.

But by the statute of Massachusetts, 1791, chap. 53, sec. 6, "no justice of the peace shall hereafter have power to issue summonses for witnesses to appear at any court, or before any justice of the peace, except on complaint brought before himself, to give evidence on behalf of the commonwealth upon any criminal suit, unless it be by the request of the attorney general, or person acting as state's attorney in the county where such justice dwells; and no witness, summoned without such request, shall be allowed any pay for his travel and attendance. And when any justice of the peace shall issue any summons at the request of the party prosecuted, it shall be so expressed in the summons; and the witness shall therein be required to appear and give evidence, upon condition such person prosecuted, pays him his legal fees, but not otherwise." It is the practice in the Supreme Court of Massachusetts for the counsel of prisoners, charged with a *capital offence*, to move the court for a summons to issue for the prisoner's witnesses, which is always granted, and ordered to be served at the expense of the state; and the legal fees of such witnesses are also paid by the government.

When the accused party, and the witnesses to be examined, are duly brought before the magistrate, he is to proceed to examine them, and decide thereon, whether the party shall be discharged, or held for further examination, or committed, or bailed. This constitutes one of the most important duties of the magistrate, and is a power which may be abused and prostituted to base and unlawful purposes, or exercised for the necessary protection of the innocent, and for the great purposes of public justice. This duty ought therefore to be well explained and understood.

The conviction and punishment of the guilty, very often depend upon the manner in which this duty is discharged by the magistrate. In some instances the confession of the party has been permitted to be erroneously obtained, or extorted; in others, compromises and compounding of the offence, and the suppression of the prosecution have been permitted or connived at; and many times the accused have been committed or held to bail, when it might have appeared from a thorough investigation,

that there was no probable cause for the accusation. And it is apprehended that the practice, as to the mode of examining the witnesses, and of the defendant, is not only not uniform, but in many instances erroneous, or not warranted by law, and the just rights of the parties.

In England the examination of the accuser, witnesses, and prisoner, in cases of felony and manslaughter, is principally regulated by the statutes of 1 & 2, and 2 & 3 Ph. & Mary. The provisions of these statutes have not been adopted in practice in this state. In cases of misdemeanor, they have no application; that is, examinations of witnesses, taken in writing as these statutes direct, cannot in any case, without the consent of the defendant, be given in evidence on an indictment for a misdemeanor.* One of the objects in passing these statutes was to enable the court and jury, before whom the prisoner was tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate.† And for that purpose they enact, that the examination of the prisoner, and information of the witnesses, shall be put in writing by the magistrate, and certified and sent up to the court before whom the prisoner is to be tried. It was necessary for a justice, when proceeding under the authority of these statutes, to attend with the most scrupulous exactness to their directions; for if their examinations were attended with the least informality, they could not be admitted in evidence, (as they might have been if taken correctly,) and received no additional sanction from the statutes under which they were taken.‡ As it respects the prisoner, the operation of these statutes depends entirely upon his will and consent; for, although they authorize an examination, they are not compulsory on the prisoner; and, as it will presently appear, there is no mode of extorting a confession, or otherwise obtaining any statement from him, which is not perfectly voluntary. Indeed this examination has been considered rather as a privilege in favor of the party accused, afforded by law for the benefit of an inno-

* 1 Chit. C. L. and cases there cited.

† 2 Leach, 558.

‡ 1 Leach, 501, 502; 2 Leach, 561; 1 Chit. C. L. 77.

cent man, who may by this opportunity have it in his power to clear himself from suspicion.*

The complainant and his witnesses must be ready to confront the prisoner, on the examination; in whose presence the evidence must always be given. By the declaration of rights in the constitution of Massachusetts, "every subject shall have a right to meet the witnesses against him face to face."† In those states where it may be the practice to take the examination of the witnesses and prisoner in writing, it may be advisable for the magistrate to hear their narrative, before he reduces it to writing; by which means he will be able to ascertain all the circumstances of the case, and perhaps to discover, by the manner of the parties, whether they are speaking truth, or combining in the assertion of falsehood. The complainant and his witnesses are then to be sworn; if Christians, either on the Evangelists, or by holding up the right hand, according to the custom and usage of the state in which the examination is had. If they are Jews, they may, if they require it, be sworn upon the Old Testament; and if of any other faith or religion, according to the ceremonies which it prescribes.‡ An oath is not required of Quakers, and others, who decline taking an oath on account of their religious scruples.§ To these an affirmation is administered, in which the ceremony of holding up the hand is dispensed with. If the party is to be sworn upon the Evangelists, he is required to kiss the book, usually the New Testament, which supposes him to be a Christian. When the testimony of those who are not Christians is required, the law allows and sanctions those forms and ceremonies to be used, which are peculiar to their religion, and consequently most binding upon their consciences. Therefore Mahometans are sworn on the Alcoran, and all others according to the ceremony of their religion.|| But if they consent to be sworn according to the usage and ceremony in our courts, the oath is equally binding upon them, as if sworn according to the cere-

* 1 Chit. C. L. 84. † 12th article.

‡ Statute 1810, chap. 128; ante, p. 12. § Statute 1824, chap. 9.

|| Phil. Evid. 19; 1 Atk. 21; where the ceremony of administering an oath to a Gentoo is stated; ante, p. 13.

monial of their own religion.* The form in use in this state is as follows, "You swear (or affirm) that the evidence you shall give in the case now in hearing, shall be the truth, the whole truth, and nothing but the truth, so help you God." When an affirmation is administered, the word "swear" is omitted, and the words "you declare and affirm" are used, and the conclusion of the oath, "so help you God," is omitted, and these words are substituted; "and this you do under the pains and penalties of perjury." An oath or affirmation, in some form or other, is absolutely necessary. In England the affirmation of a Quaker in criminal cases is not admissible.†

When the witnesses are thus sworn, the justice, in those states where the practice requires it, reduces the examination of each of them to writing, in a plain, intelligible manner, and, as nearly as possible, in the language in which the narration is delivered. All the facts and circumstances are to be inserted, which are necessary to prove the felony; and if this be properly done, though the commitment should be informal, the prisoner will not be discharged on the ground of any defect in the mittimus.‡ In Massachusetts, it is not the usual practice to take the testimony of the complainant and witnesses in writing. It is sometimes done in capital cases, and in other cases in which a particular interest is taken or excited; but such written testimony is not made use of on the trial, unless by the consent of the prisoner; though it undoubtedly may be, to contradict or impeach the testimony of a witness when it materially varies, or is repugnant to what he swore to before the magistrate.

It is a general rule, that all persons may be witnesses before a magistrate, who have the use of their reason, and have such religious belief as to feel the obligations of an oath; unless they are disqualified by interest, or have been convicted of an infamous crime.§ A magistrate ought not to admit the testimony of any person in a criminal prosecution before him, who has not a com-

* Pr. Jackson J. in a case at nisi pruis; Mass. stat. 1797, c. 85, s. 10.

† 1 Chit. C. L. 78; Phil. Evi. 19, 20.

‡ 8 East, 157; 1 Chit. C. L. 78, post, Part 2, form of taking examinations.

§ Ante, p. 12.

petent share of reason to know the nature of an oath, and understand its moral obligations ; such as very young children ; persons insane ; idiots or lunatics, unless in their lucid intervals ;* nor of atheists, who profess no religion at all, which can bind their consciences to speak the truth ; nor of persons rendered infamous by the conviction of certain crimes, such as felony, perjury, forgery, conspiracy, and such other offences of the same nature, as necessarily imply falsehood. There is no disqualification on the ground of relationship, except that of husband and wife. But other near relationship may induce such a suspicion of partiality, as greatly to lessen the weight of the evidence of him who may deliver it.† A witness may be *competent*, who is not *credible* ; and in such case a magistrate is to judge, like the jury on a trial, how far the witness is to be credited.‡ The nice shades of distinction, as to the degree of belief, are matters of fact to be judged of by the justice, as they are by a jury, and are infinitely too subtle and numerous to become the objects of general inquiry.§

Inability to understand the meaning of an oath, by infancy or defect of understanding, renders a witness incompetent. A person insane, cannot be admitted to be sworn while he is in that condition ; but he may, (if he sufficiently recover the use of his understanding,) in a lucid interval.|| A person born deaf and dumb, is not on that account incompetent ; but if he have sufficient understanding, may give evidence by signs, with the assistance of an interpreter.¶ A case in the Supreme Court of Massachusetts is recollected, where the defendant was deaf and dumb, and was indicted and convicted of a felony ; the indictment, as it was read to him, was interpreted by a person with whom he had been in the habit of conversing by signs ; his plea of not guilty was recorded, the nature of which also was interpreted to him ; and all the necessary communications to him during his trial, were satisfactorily made in the same manner.

Children, who are not able to understand the moral obligations of an oath, cannot be examined as witnesses before a magistrate.

* Phil. Ev. 14, 17, 22, and the authorities there cited. † 2 Hale, 276.

‡ 1 Burr. 417. § 2 Hale, 277, 278. || 2 Hale, 278 ; Phil. Ev. 14.

¶ Phil. Ev. 14 ; 1 Leach, C. L. 455, Ruston's case.

There seems to be no precise age fixed, at which infants are excluded from being witnesses; though formerly it was a general rule, that none could be admitted under the age of nine years.* A more reasonable rule has since been adopted; and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. In a case of assaulting an infant of five years of age, with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil; but that they cannot be examined in any case without oath.† This is said to be now the established rule in all cases, criminal as well as civil. In a trial for a rape in the Supreme Court of Massachusetts, a boy under nine years of age, who was present when the crime was committed, was admitted as a witness, after due examination by the court as to the degree of his understanding; it appearing to the court, that he possessed a sufficient sense of the wickedness and danger of false swearing.‡

In a case in Pennsylvania, it was said by Mc Keen C. J., that it was a settled point at common law, that a slave could not be a witness, because of the unbounded influence of his master over him, which was at least equal to duress; and that it would be difficult to administer an oath to a slave, for want of knowing any religion he professed.§ By a statute of New York, no slave can be a witness in any case, except for or against another slave in criminal cases. Sess. 36, c. 88, s. 19, 2 R. L. 207. But a free black man is a competent witness to prove facts, which may have happened while he was a slave.||

The credit of a witness, which is greatly impaired by his age, is to be judged of by the justice or jury, from the manner of his testifying, and other circumstances.¶ And it seems reasonable to add, that when persons, from their great age and infirmity, are reduced to second childhood, the same rules should be adopted respecting their *competency* as witnesses, as are applied to infants.

* Phil. Ev. 14, and cases in East P. C. 442.

† 1 East P. C. 443, 444; 1 Leach. Cr. C. 237.

‡ 10 M. R. 225.

§ 4 Dall. 145. n. 1. || 1 Johns. Rep. 508.

¶ 10 M. R. 225, Hutchinson's case.

Witnesses are also incompetent from defect of religious principle. Our law, like that of most other civilized countries, requires a witness to believe that there is a God, and a future state of reward and punishment; and that, by taking an oath, he imprecates divine vengeance upon himself, if his testimony shall be false.* Atheists, and such infidels as profess not any religion, that can bind their consciences to speak the truth, are excluded from being witnesses. The *infidels*, who were anciently excluded from being witnesses, comprehended Jews, as well as heathens, and those who believed neither the Old nor the New Testament.† But a different and more liberal opinion now prevails. In the time of Lord Hardwick it was solemnly decided, that the testimony of witnesses professing the Gentoo religion, who had been sworn according to the ceremonies of their religion ought to be admitted.‡ Lord Hale also strongly points out the unreasonableness of excluding indiscriminately, all heathens from giving evidence, as well as the inconsistency of compelling them to swear in a form which they may not consider binding.§ And it now may be considered as an established rule, that infidels of any other country, who believe in a God, the avenger of falsehood, ought to be received here as witnesses.‡

It has been decided in the state of Connecticut, that every person who does not believe in the obligations of an oath, or any accountability for his conduct after death, is by law excluded from being a witness. And that every person who believes in the obligation of an oath, whatever be his religious creed, whether Christian, Mahometan, or Pagan, or whether he disbelieves them all, is an admissible witness; and may testify in a court of justice, being sworn according to that form of oath which he holds obligatory.|| For the purpose of trying the competency of a witness, when objected to upon the ground of a defect of religious principle, the proper question is, not as to his particular

* Phil. Evid. 16; Leach, Cr. C. 482; 1 Atk. Rep. 19, 48.

† Co. Lit. 6. b; Hawk. b. 2, c. 46, s. 148.

‡ Phil. Ev. 17; 1 Atk. 21; 1 Wils. 84, S. C. § 2 Hale, 279.

|| 4 Day, 51; Swift's Ev. 48. See his excellent remarks upon this case in his Law of Evidence.

opinions, but whether he believes in the existence of a God, and a future state.* But it has been resolved by the judges in England, not to permit adult witnesses to be interrogated respecting their belief of the Deity, and a future state. It is probably more conducive to the course of justice, that this should be presumed, till the contrary is proved.†

Another cause of the incompetency of witnesses proceeds from the conviction of certain crimes, or from infamy of character. There are several offences which the law considers such blemishes on the moral character, as to incapacitate from giving evidence in a court of justice ; such a treason, felony, forgery, perjury, subornation of perjury, conspiracy, and other offences of the same kind, necessarily implying falsehood.‡ As convicts in such offences cannot be witnesses, they cannot make affidavits to support a charge *against* others ; but to exculpate, or defend *themselves*, their affidavits have been allowed ; and on the same principle the affirmations of Quakers are admitted in their own defence on a criminal charge, although in England it is not admitted in criminal prosecutions against others.§ It is not the punishment, as formerly thought, but the nature of the offence, which causes the infamy and creates the disability.|| It was so decided expressly by the whole court, in the case *Pendock v. Mackender*.¶ Upon this principle, it is no objection against the competency of a witness, that he has suffered an infamous punishment for a crime which is not infamous in its nature, as for a libel or a riot ; he is not incompetent unless he has suffered for the *crimen falsi* ; that is, for some of the crimes above enumerated, and which necessarily imply falsehood ; for it is the crime, not the punishment, that incapacitates.** And on the other hand, after judgment for any of those crimes which do incapacitate, he is not competent, though the punishment may have been only a fine.††

* Peake's N. P. 11.

† 3 Bl. Com. 369, note by Christian.

‡ Phil. Ev. 21, 22.

§ Phil. Ev. 23 ; 2 Salk. 461 ; 2 Str. 1148.

|| Phil. Ev. 23.

¶ 2 Wils. 18.

** Phil. Ev. 23 ; and the cases there cited.

†† Ib.

The common rule and the common language is, that a *conviction* makes the witness incompetent; but it is not conviction alone that incapacitates. The *judgment* therefore, as well as the conviction must be proved; and can only be proved by the record. Even the admission of the witness himself, that he has had judgment against him for larceny, or other crime which would incapacitate him, will not make him *incompetent*; but such admission may be given in evidence to effect his credibility.*

There is but one mode now in use, of restoring the competency of a witness; and that is by pardon under the great seal of the state. The ancient mode of restoring competency by *purgation*, and that which succeeded it, burning in the hand, as it was provided and directed by certain ancient English statutes, seems to us at this day, a ridiculous compound of superstition and cruelty. Nothing can be more judicious or salutary than the provisions of our constitutions, which place this power in the hands of the supreme executive of the state; which, when fully exercised, is an effectual mode of restoring the competency of a witness. It must be *fully* exercised to produce this effect. For if the *punishment* only be pardoned or remitted, it will not restore the competency, and does not remove the blemish of character.†. There must be a full and free pardon of the *offence*, before these can be restored and removed. And when this is done, it is now settled, that even after conviction, it not only takes off every part of the punishment, but also clears the subject of it, from the legal disabilities of infamy, and all other consequences of the crime; it makes the witness a new creature, and gives him a new capacity.‡ And it is highly expedient that a pardon should be allowed to produce this effect; otherwise a person once convicted, would be stigmatised for life, though in the opinion of mankind his character may have been completely retrieved.§

* Phil. Ev. 74; 6 East, 79; 11 East, 309.

† This opinion is believed to be correct, notwithstanding it is laid down in the books, that if the punishment of the burning of the hand be remitted, it has the same effect as a pardon. Phil. Ev. 27; Hawk. b. 2, c. 37, s. 49.

‡ Phil. Ev. 27; 10 Johns. R. 232.

§ In the case of the Commonwealth v. Green, it has been recently decided, that a conviction of larceny in New-York does not disqualify a witness from

When the disability is declared by law to be a part of the punishment, a pardon, it is said, will not make the witness competent.* And if the pardon be conditional, the performance of the condition ought to be shown ; for on that depends all its efficacy.† A knowledge of the law upon the subject of the preceding remarks, relative to the competency of witnesses (which are principally given in the language of the several authors quoted), is very important to all magistrates for this reason ; that in all trials, examinations, and proceedings, before them, they are equally applicable and binding, as in the higher courts. To these remarks, it may be added, that in all criminal trials and proceedings before a justice of the peace, it is the right of the party accused, and of the prosecutor, to have the witnesses separated during the time of the examination, and their testimony given in the absence of each other. This is the constant practice in the higher courts.

It is now proper to consider the duty of magistrates in obtaining the evidence of accomplices. They ought to be well instructed in their duty in this respect ; otherwise they may be the means of great injustice both to the government, and the party who may expect favor from this source.

The engagement of a justice of the peace to an accomplice, that if he will give his evidence he may expect favor, is merely a personal engagement on his part, that he will recommend the accomplice to mercy ; for a justice of the peace has no authority to promise him any favor, or to tell him that he shall be a witness against others. A justice of the peace has no authority to select whom he pleases to pardon or prosecute ; and the prosecutor has less power, or rather pretence, to do this, than the justice.‡ Whatever promises or engagements a justice may make with an accomplice, and however punctually or faithfully the accomplice may comply with the conditions upon which such promises may have been made, he cannot avail himself of them

testifying in the courts of this state. See the learned and elaborate opinion of Parker C. J. in that case, 17 M. R. 514.

* Phil. Ev. 27, and cases there cited ; Hawk. b. 2, c. 46, s. 112.

† Hawk. b. 1, c. 37, s. 45.

‡ 1 Chit. C. L. 88 ; 1 Leach, C. L. 115.

on his trial. They may operate as an equitable claim upon the government for a pardon, or a postponement of his trial. And on this account, the greatest caution and judgment ought to be used by justices of the peace upon these occasions. The power assumed by them of admitting accomplices to be witnesses, is founded in practice only, and does not control, and in many cases ought not to influence, the authority of the court by which the accomplice is liable to be tried. The accomplice, therefore, may be deceived and drawn in, under the color and pretence of judicial authority and power of protection, to disclose what he is not bound to discover, and thus make himself the deluded instrument of his own conviction.* The benefit of the accomplice is, in fact, nothing more than a mere *hope* that he may be exonerated from punishment; but in this hope, he may be deceived and disappointed; and when that is the case, he has not, in reality, any grounds to complain of a breach of public faith, as sometimes happens to be the case. There can be no breach of public faith when it is pledged without competent authority. The correct practice is in conformity to these principles; for no justice would probably take the responsibility of releasing an accomplice who offers to give evidence against his associates; but commit him for trial, and leave the event to the decision and control of the court before whom he is liable to be tried.† In some cases, when an accomplice offers to testify against his associates, and more especially when he offers to point out the place where the evidence of the guilt of his associates may be discovered (as by discovering the places where stolen goods, or counterfeit bank notes are deposited), it may be safe and advisable for the justice to inform him, that if he conducts fairly in every respect, and discloses the *whole truth*, concerning the guilt of himself and associates, his punishment may be mitigated, and perhaps he may obtain a pardon; but he ought to inform him at the same time, that he has no power or right to promise, or make any engagement with him to that effect; and further, that his confession, testimony, and disclosure, must not

* Cowper, 831.

† 1 Chit. ch. 83.

only be perfectly voluntary, but that it must be found to be strictly according to the truth. The magistrate should also recollect, that the credibility of these accomplices, when made witnesses, is always doubtful, suspicious, and liable to be impeached; and that their testimony, unless fully corroborated by other evidence, is of very little, and generally of no weight or value in the prosecution. Such testimony would never have been admitted, but from a principle of public policy and necessity; without which it is sometimes impossible to detect many crimes the most detrimental to society.*

The old doctrine of approvement, which is now grown obsolete, is not particularly stated here; for though the practice of admitting accomplices to give evidence against their associates, has been adopted from analogy to that ancient practice, the power to admit or refuse a person to be an approver, which was always to the discretion of the court, could not, it is presumed, have extended to justices of the peace.

The examination of the prisoner, his answer to the charge against him before the magistrate, and the magistrate's duty in this respect, are now to be explained. And as on the one hand, great trouble and expense to the government may be saved, when a prisoner is ready and willing to make a free and voluntary confession of his guilt when brought before the magistrate; and on the other, great injustice may be done to him, when he is flattered or improvidently advised to make this confession, a careful and judicious course of conduct, in the discharge of this duty, is of great public importance.

In this state, the simple and usual course is, when the prisoner is brought before the magistrate, to read the complaint to him, and ask him whether he is guilty or not guilty. In those cases which are within the jurisdiction of a justice, this course is necessary. But in those cases where the prisoner is not to be tried by the justice, but is brought before him, either to be bailed or committed for a crime not cognizable by the justice, it has been doubted whether the justice ought to require the prisoner to make any answer to the complaint or charge; and some have

* Phil. Ev. 28.

said that he can regularly do no more than examine the witnesses to prove the truth or probable grounds of the charge, and thereupon either discharge, bail, or commit the offender. No decisions or authorities are recollected, upon which this doubt can be founded. And when the justice performs his duty to the prisoner by informing him that he is not bound to accuse himself or confess his guilt, no danger or injustice can result from the practice. The caution, and even delicacy, made use of, in this country, towards persons accused and on trial for criminal offences, is carried to a great degree of refinement. It is a laudable practice; but it may be, and has been, extended beyond the bounds which the strictest regard to the rights of the party requires. Whenever, therefore, a man is brought before a magistrate upon a criminal charge, of whatever nature it may be, there can be no reasonable objection, or *indelicacy*, in asking him whether he is guilty or not guilty of it.

When the party is brought before the magistrate, he ought to be cautioned, that he is not bound either to accuse himself, or confess his guilt; and that any confession or admission of that nature may be produced in evidence against him on his trial.* And at all events, no improper influence, either by threats or promises, ought to be employed; for however slight the inducement may have been, a confession so obtained cannot be received in evidence.† The justice should also be upon his guard against confessions uttered by collusion; as was the case where two brothers committed a robbery and fled; the younger brother, who was innocent, in order to favor their escape, when examined, dropped hints amounting to a constructive admission of his guilt; on this he was committed to prison, and the pursuit of his brothers was discontinued. On his trial he proved an *alibi*, and obtained an easy acquittal; and in the mean time the actual felons escaped with their plunder.‡

If, however, by means of a confession *unduly obtained*, other facts are brought to light, they may be proved against the party,

* 1 Chit. C. L. 85.

† Phil. Ev. 50, 1, 2; 2 Hale, 284; 1 Leach, 263, 291, 386.

‡ 1 Chit. 85, 86; Dick. J. Examination, 111.

though the confession itself is inadmissible.* Another caution, which it is the duty of a magistrate to make use of, when in his power, is, to prevent the prosecutor and the officers who may have the party in custody, from any attempts to obtain a confession of his guilt. Both officers and prosecutors are apt to be extremely officious in this way, and many evils both to the public and to individuals have resulted from it. If the slightest influence is made use of for this purpose, and a confession thereby obtained, such confession is not only of no validity, but all subsequent confessions, however free and voluntary, whether before the magistrate or any other person, are inadmissible on the trial of the party. In the case of the *Commonwealth v. Thomas Bullough & al.* for burglary, the officers and others who had the prisoners in custody previous to their examination, made them certain promises and held out to them certain inducements to confess their guilt. Whereupon one of them did confess it; and stated all the circumstances of committing the burglary. When he was afterwards examined before the committing magistrate, he again made a confession of his guilt to him. The magistrate, before he made a record of this confession, very properly explained to him the consequences of his confession—that he was not bound to make it; that he ought not to make it if he was innocent, and that if he did, it would be given in evidence against him on his trial, and that it might cost him his life. Notwithstanding all these precautions and humane suggestions on the part of the justice, the prisoner still persisted in the confession. But the court rejected the evidence of the confession, on the ground, that it might not have been made, had not the first confession been improperly obtained; and the prisoner was acquitted. It appeared also in that case, that the prisoner, after he was fully committed for trial, drew up a written confession in his own hand writing, and delivered it to the keeper of the prison. This confession was also offered in evidence, but rejected by the court, for the reasons above stated. Perhaps there has been no case, where the humane principle in favor of the accused party,

* 1 Chit. 85, 86; Dick. J. Examination, 111.

has been carried so far. And it is a strong proof of the necessity, on the part of magistrates, of preventing this kind of interference, as far as possible, by officious and misguided officers and individuals. The case above alluded to has not been reported.

The mode of obtaining these confessions receives additional importance from the circumstance, that a free and voluntary confession of a person accused of an offence, whether made before he is arrested or after, whether on a judicial examination, or after commitment, whether reduced to writing or not, and made at any time or place, provided it be voluntary, is strong evidence against him, and if satisfactorily proved, sufficient to convict without any corroborating circumstances.* It is the practice in this state, for the court to decide upon the *fact*, whether the confession was improperly obtained or not; and if they decide that it was, the evidence of the confession is declared to be incompetent, and the confession is rejected upon that ground. In Vermont the confession of a person on trial for a crime, must be submitted to a jury. If extorted by personal suffering, it ought not to weigh in the least; if produced by fear or flattery, the jury must determine whether it is true or not; and if unsupported by corroborating circumstances, it cannot operate to convict.†

Where it is the practice for the justice to take the examination of the prisoner in writing, the following directions are to be observed. The examination of the prisoner ought not to be taken upon oath, and when thus taken it has been rejected.‡ The reason of this is, that the examination must be entirely voluntary, and therefore the prisoner must never be required to swear to it. But it must be taken in writing, according to the English statutes; and must be returned to the court. But if not taken in writing, parol evidence of the prisoner's declaration is admissible. The signature of the prisoner, though it is advisable

* Phil. Ev. 80; 1 Leach, Cr. C. 349.

† 2 Tyler's Rep. 377.

‡ 1 Chit. C. L. 86; 1 Hale, 585; Bac. Abr. Evidence L, and other authorities there cited.

to obtain it, is not essentially requisite.* It is competent, however, for the prisoner to retract his admission of guilt before the magistrate, so as to prevent his examination from being read in evidence against him under the statute of 2 & 3 Ph. & Mary. But still the previous admission may be given in evidence, independently of the statute, as a confession of the offence.† If there be more than one person accused, it is of importance that all of them should be examined apart, that an opportunity may be afforded of detecting any variations in their story.

If, pending the examination, the prisoner or any other person insult the magistrate, he may be committed, as this is an indictable offence; and without this power no court could exist.‡ Such commitment, however, cannot be to detain the party till he retract, or make personal submission for the offence; but must be till he be discharged according to due course of law.§ The examinations thus taken should be attached to the complaint and process, in the order in which they are taken, and remain in the hands of the magistrate, until they can be transmitted to the clerk's office of the court to which they are returnable, which ought always to be done in such season, as that they may be delivered to the public prosecutor on the morning of the first day of the session; or when convenient they may be delivered into the hands of the public prosecutor himself.

If upon the examination of the whole matter, it manifestly appears, either that no crime was committed by any person, or that the suspicion entertained against the prisoner was wholly groundless, it is lawful for the magistrate to discharge him.|| But if there be an express charge of felony on oath, against the prisoner, though his guilt appear doubtful, the justice cannot discharge him, but must bail or commit, according to the circumstances of the case. And it is said, that if a person be killed by another, though it be by misadventure, or in self-defence, which is not felony, but excusable homicide, yet the justice ought not to

* 2 Leach, Cr. C. 552, 637. † 2 Leach, Cr. C. 552.

‡ 1 Str. 421; 1 Chit. C. L. 88. See form of mittimus, post, Part 2.

§ 14 East, 142; 1 Chit. C. L. 88.

|| 4 Bl. Com. 296; Hawk. b. 2, c. 15, s. 1; 1 Hale, 583; 2 Hale, 121.

discharge him, for he must undergo his trial.* And in modern practice, though exculpatory evidence is received at the instance of the prisoner, yet unless it appear in the clearest manner that the charge is malicious as well as groundless, it is not usual for the magistrate to discharge him, even when he believes him to be innocent.† The inconvenience to the party charged in such case, will be but temporary ; since the Supreme Judicial Court, or any judge thereof in time of vacation, may admit any person to bail, at their discretion, for any crime whatever, when the circumstances of the case shall appear to require it ; persons committed by the governor and counsel or either branch of the legislature, for the causes mentioned in the constitution, always excepted.‡ And though cases may sometimes happen, in which it would be extremely hard to confine a man in prison, though accused of the greatest offence, yet it would greatly tend to elude the public justice, were bail to be commonly allowed for such enormous crimes.‡

The duty of a justice *on the trial of an issue* for offences within his jurisdiction, will now be stated. This subject has been in some degree anticipated, in the preceding part of this chapter. The course of proceedings there pointed out, relative to the power of the justice to detain the party for further examination ; the manner of keeping and of recognising him for that purpose ; the mode of examining the witnesses, and the party ; the competency of witnesses and manner of summoning them ; the mode of proceeding with accomplices ; the power of the justice to punish contempt of his authority ; and of discharging the prisoner when there is no sufficient evidence to proceed against him, are applicable to, and may be properly adopted upon the *trial* of the party.

The following are the offences intrusted to the jurisdiction of a justice of the peace by the statutes of this commonwealth. 1. Assaults and batteries which are not of a high and aggravated nature.§ 2. Larcenies, where the property stolen does not ex-

* 2 Hale, 121 ; Hawk. b. 1, c. 2.

† 1 Chit. C. L. 9.

‡ 4 Bl. Com. 296 ; Mass. Statute 1784, chap. 72, & 1812, chap. 80.

§ Statute 1794, chap. 26.

ceed the value of five dollars.* 3. The several offences against the statute providing for the due observation of the Sabbath.† 4. Offences against the statute to prevent profane cursing and swearing.‡ There are several other offences, of which a justice of the peace may take a kind of partial cognizance, not strictly judicial. He may take the confession of a female, as directed in the proviso of the first section of the statute for the punishment of fornication.§ He may cause servants and apprentices, bound by deed, who abscond from the service of their masters, to be apprehended, returned to their masters, or committed to prison, in pursuance of the statute of the 28th of February 1795.|| There is a similar provision in the laws of the United States, respecting fugitive slaves escaping from one state into another. The provision of the statute of the United States in these cases, is to the following effect: that when a person, held to labor in any of the United States, shall escape into any other of the said states, the person to whom such labor or service may be due, or his agent or attorney, may arrest such fugitive, and take him before any of the judicial officers mentioned in the statute, (among whom are magistrates of a county, city, or town,) and upon proof to the satisfaction of such magistrate, he may certify that the person arrested doth owe service to the person claiming him or her; and it is made the duty of such magistrate to give a certificate thereof to such claimant, his agent, or attorney, which shall be a sufficient warrant for removing such fugitive from labor, to the state or territory from which he or she fled.¶

There is also a very particular and *wholesome* provision by a statute of this commonwealth, directing the proceedings for the speedy removal of *nuisances*; by which two justices of the peace *quorum unus*, are authorized to inquire, by a jury, into all nuisances, and to cause them to be abated and removed.** All the forms of proceeding, from the warrant upon the complaint to the warrant of removal, are therein particularly stated and enacted.

* Statute 1804, chap. 143, sec. 2.

† Statute 1791, chap. 58, & 1796, chap. 89.

‡ Stat. 1798, chap. 83.

§ Statute 1785, chap. 66.

|| Statute 1794, chap. 64.

¶ Laws of United States, 2 vol. 331, chap. 152.

** Statute 1801, chap. 16.

But the form of the complaint is not given. Although no cases upon this statute are recollected, the provisions of it appear to be extremely necessary and salutary. The proceedings directed by it are summary ; but all the constitutional rights of the citizen are preserved. It is intended to operate in cases requiring a speedy, and in some instances an *immediate* remedy ; and may be so enforced as to prevent injury or destruction to the public health, for which purpose the ordinary process by indictment in the higher courts might be altogether ineffectual.

When a criminal appears before a justice, or is brought in upon a criminal process to be tried, the subsequent proceedings are, 1. Arraignment. 2. Plea and issue. 3. Trial. 4. Judgment and execution.

The *arraignment* is to call the prisoner to answer the matter charged upon him in the complaint.* He is first to be called by his name, that it may appear by his answer, that he acknowledges himself to be the person charged, and to be of that name by which he is called. In capital cases only, he is required, for the same purpose, according to the usage of the Supreme Court, to hold up his right hand. This is required merely for the purpose of identifying the person, and therefore any other acknowledgment will answer as well.† After he is called, the complaint is then to be distinctly read to him, that he may understand the charge ; and thereupon the justice demands of him whether he is guilty or not guilty. If upon this arraignment the party confesses the charge, the plea of guilty is to be recorded, and nothing further is done till sentence is pronounced. If he denies the charge, the plea of not guilty is to be recorded.

The plea of guilty, or confession of the party, is the last incident of the arraignment. This may be either express or implied. An express confession of the complaint is where the party pleads guilty, and thus, directly in the presence of the justice, confesses the accusation. It may be received after the plea of not guilty is recorded, whenever the defendant wishes to withdraw his plea of not guilty, and confess the accusation.‡

* 4 Bl. Com. 317 ; 2 Hale, P. C. 216.

† 4 Bl. Com. 318.

‡ 2 Hawk. b. 2, c. 31, s. 1.

An *implied confession* is when, in small offences, generally assaults and batteries that are not of an aggravated nature, a defendant does not directly own himself guilty, but tacitly admits it, by throwing himself upon the mercy of the court, and desiring to submit to a small fine. This the justice may either accept or decline, as he thinks proper.* If the justice grants the request, he makes an entry to this effect, "that the defendant will not contend with the commonwealth, but submits to its grace." The difference in effect, between this implied confession, and an express confession by the plea of guilty, is, that a plea of guilty may be given in evidence against the defendant, in a civil action for the same injury, which cannot be done, where the confession before the justice is only an *implied* acknowledgment of his guilt.†

If the prisoner obstinately *stands mute*, it is equivalent to a conviction, and he is to be sentenced accordingly. A prisoner is said to stand mute, when upon his arraignment he makes no answer at all; or answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise. If he makes no answer at all, the justice must inquire whether he stands *obstinately* mute, or whether he be dumb by the visitation of God. If he finds the latter to be the case, he is to proceed to the trial, and examine all points, as if the party had pleaded not guilty.‡ If he finds that he stands mute *fraudulently* and *obstinately*, the justice is to proceed to sentence him, as in case of conviction. Commonwealth v. Moore, 9 Mass. Rep. 402, where the whole proceedings are stated. When the party to be tried is deaf and dumb, he may, if he understand the use of signs, be arraigned, and the meaning of the justice who addresses him conveyed to him by signs, and his signs in reply explained to the justice, so as to justify his trial, and the infliction of the legal punishments.§ This course, precisely as here stated from the English authorities, has been pursued in the Supreme Court of Massachusetts. The case now recollected, occurred in the county of Lincoln; but as the trial was at *nisi prius*, no note or report of it has been published.

* Hawk. b. 2, c. 31, s. 3.

† Id.

‡ 4 Bl. Com. 320.

§ 1 Chit. C. L. 417; 1 Leach, 101.

If the party does not plead guilty or stand mute, his plea, or the matter alleged in his defence, is the next subject of consideration on the trial. No reason is at present perceived, why the party is not entitled to all the pleas and matters of defence upon his trial before a justice for an offence within his jurisdiction, that he is by law entitled to, in a trial in the higher courts. If this opinion be correct, he may plead to the jurisdiction of the justice; or he may demur to the complaint; or plead in abatement; or in bar, as well as the general issue.

A plea to the jurisdiction is where a complaint is entered before a justice, which he undertakes to try and decide upon, for an offence of which he has no cognisance. In such cases the party may except to the jurisdiction of the justice, without answering at all to the crime alleged.*

A demurrer to a complaint is incident to criminal as well as civil processes, where the fact, as alleged, is allowed to be true, and the party insists that it does not amount to the crime alleged, or to any crime whatever. But demurrers in criminal processes are seldom used; since the same advantages may be taken upon a plea of not guilty, or afterwards in arrest of judgment.†

A plea in abatement is principally for a misnomer, a wrong name, or false addition to the party accused. But there is little advantage accruing to the party from pleas to the jurisdiction or in abatement; because if the pleas be allowed, a new complaint will be made, and another process thereupon issued against him;‡ which ought always to be made ready immediately, and even before the party is discharged upon the defective process, in order to prevent his escape from punishment.

Special pleas in bar go to the merits of the complaint and prosecution, and give a reason why the party ought not to answer at all, nor put himself on trial for the crime alleged. These are of three kinds, viz. a former acquittal; a former conviction; and a pardon. A former acquittal is grounded on the universal maxim of the common law, that no man is to be brought into

* 4 Bla. Com. 327; 2 Hale, P. C. 236.

† 4 Bla. Com. 328, 329.

‡ 4 Bla. Com. 329.

jeopardy more than once for the same offence ; and hence it is allowed as a consequence, that when a man has been once fairly found not guilty upon a criminal prosecution, before a tribunal having jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same.*

The plea of a former conviction for the same identical crime, is a good plea in bar to a criminal prosecution before a justice ; and this depends upon the same principle as the former, that no man ought to be twice brought in danger for the same crime.

A pardon may also be pleaded in bar ; but this can only be done after conviction ; for by the constitution of Massachusetts, chap. 2d, article 8th, it is provided, " that no charter of pardon granted by the governor, with advice of the counsel, *before conviction*, shall avail the party pleading the same, notwithstanding any particular or general expressions contained therein, descriptive of the offence or offences intended to be pardoned."

In capital cases, if the prisoner plead in bar or abatement, and it be adjudged against him, he will have liberty to plead over to the matter of the indictment, as if he had never relied upon any other ground of defence ; for though a man may lose his property by mispleading, he cannot forfeit his life by any technical nicety or legal error ; but this does not extend to misdemeanors as a matter of *right* ; and therefore, in these cases, if a defendant plead in abatement or bar, and an issue in fact thereon be determined against him, he will have lost the benefit of a trial on the offence itself, and sentence *may* be pronounced as though he had been regularly convicted. But it is in the discretion of the court to allow him still to plead not guilty ; and this discretion they will generally exercise in favor of the defendant.† These rules and principles of the common law may be adopted and applied by a justice of the peace in the trial of offences within his jurisdiction.

The right of an appeal, from a sentence given by a justice of the peace, is given to any person aggrieved at such sentence, in the third section of the act, vesting certain powers in justices of

* 4 Bla. Com. 329. † 1 Chitty, C. L. 435, and the cases there cited.

the peace in criminal prosecutions.* The mode of prosecuting such appeal is also pointed out in the same section of the statute. The recognisance to be taken by the justice to prosecute the appeal, ought to be in such a sum, as will insure the personal appearance of the party, and the fulfilment of the condition with respect to the payment of the costs of the prosecution, in case of a conviction. And the same precautions as to the ability of the party, and his sureties to pay the penalty of the recognisance, if forfeited, which have been herein before recommended, will, in taking recognisances to prosecute an appeal, be adhered to by the magistrate.†

The duty of justices of the peace to account for all fines by them imposed and received, which is enjoined by the fourth section of the statute above mentioned, ought to be strictly and *conscientiously* complied with. For, in addition to the pecuniary penalty inflicted for the neglect of this duty, it would be a proper ground of impeachment and removal from office, in all cases where the fines have been received, and corruptly retained or embezzled.

CHAPTER V.

THE TAKING OF BAIL, AND RECOGNISING THE WITNESSES.

THE magistrate having completed the examinations, and ascertained that the party accused is not to be discharged, is next to determine whether he shall bail or commit him.

Bail is a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance at court to answer the charge against him ; he being supposed to continue in their friendly custody, instead of going to prison. In most of the inferior offences, bail will answer the same intention

* Statute 1783, chap. 51.

† Post, chap. 5.

as commitment, and therefore it ought to be taken. But in offences of a capital nature, no bail can be security equivalent to the actual custody of the person. There is nothing that a man may not be induced to forfeit to save his life ; and it is no satisfaction or indemnity to the public, to seize the effects of those who have bailed a murderer, if the murderer himself be suffered to escape with impunity.* The duty of magistrates, in relation to the taking of bail, is extremely important, requiring the exercise of great judgment and firmness. The two extremes of demanding excessive, and of accepting insufficient bail, are what it is equally his duty to avoid ; and in many cases he may be exposed to the censure of the public or of individuals, if he transcends, or falls short of his duty in either of these cases.

To refuse or delay to bail any person who is entitled to bail, is an offence at common law against the liberty of the subject, and for which the magistrate is also liable in damages to the party injured. It was also made punishable by ancient English statutes.† And lest the intention of the law should be frustrated by magistrates requiring bail to greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. that excessive bail ought not to be required. In conformity to these provisions, is the twenty-sixth article of the declaration of rights, in the constitution of Massachusetts, the words of which are, “no magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.” What bail shall be called excessive, must be left to the magistrate to determine, on considering the circumstances of the case. And on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal does not appear ; but if he does appear according to the condition of the recognisance, those who admitted him to bail are safe ; inasmuch as the end of the law is answered, whenever the appearance of the prisoner is in effect procured.‡

* 4 Bla. Com. chap. 22.

† 3 Edw. I. & 31 Car. II. called the habeas corpus act.

‡ Hawk. b. 2, c. 15, s. 6.

It also is an offence at common law for a magistrate to grant bail, where it ought to be denied, and it is punishable as a negligent escape.* It has been decided, that it is no excuse for justices of the peace admitting a person to bail, who was committed for an offence not bailable by law, that they did not know he was committed for such offence; for that they ought, at their peril, to inform themselves of the cause for which the party was committed, that they might thereby be satisfied that he was bailable by law. The magistrate is not bound to demand bail, or that the person to be bailed shall find sureties; nor is he bound to forbear committing the party, till he shall refuse to find sureties; but may justify a commitment unless the party himself shall tender his sureties.†

At common law no justice, nor indeed any court, can bail a person in execution on a judgment, or conviction of any offence; for such imprisonment without bail is a part of the sentence and punishment.‡ Nor is it usual or expedient to bail the party between the conviction and judgment. And upon motion to the court, it is proper after conviction, when the party is under recognisance, and sentence is to be suspended, to have the amount of the penalty of the recognisance increased, and new sureties procured, if the former recognisance or sureties be not satisfactory.

A justice of the peace has no authority to bail an offender, who has absconded after conviction, and before sentence, and who has been apprehended upon a new warrant during the vacation, although the offence for which he was originally committed was bailable. This point has been recently decided upon demurrer, by the Supreme Court of Massachusetts. The case was, one Otis was bound over upon a charge of forgery, which, by the laws of this state, is a bailable offence. He was tried, and convicted; but before sentence was passed upon him, he absconded, and forfeited his recognisance. Several years afterwards, he was brought back into this state by virtue of a warrant

* Hawk. b. 2, c. 15, s. 6.

† 2 Str. 1216; Hawk. b. 2, c. 15, s. 12, 14.

‡ 4 Bl. Com. 295; 8 T. R. 325; 1 Wils. 299.

from the Supreme Executive, as a fugitive from justice. He was carried before a magistrate, who admitted him to bail, and he was recognised anew to appear at the next term of the court in which his conviction was had, to receive sentence. He did not appear; and upon a *scire facias* to recover the penalty of the recognisance, and demurrer to it, the court decided that the magistrate had no authority in such a case, to admit him to bail; but that it was his duty to commit him, where he would remain in custody until the next term of the court, when and where he would regularly receive his sentence.

The practice in England relative to the taking of bail, is principally regulated by the statutes of that country. It is much the same in this country. Some of the English statutes upon the subject will be referred to; others, to which access cannot be conveniently had, will probably be familiarly known, to those who may have occasion to regulate their practice in pursuance of them.

The course of a magistrate's duty in this country, upon the subject of bail, seems to be very plain, so far as it respects the offences which are or are not bailable. In general it may be stated as true, that no justice of the peace can admit a man to bail, who is charged with an offence, the punishment of which is death; and that he is bound to admit to bail persons charged with all other offences, unless in cases where bail is prohibited or restrained by particular statutes. In the former cases, the public are entitled to demand the highest security that can be given, viz. the body of the accused, in order to insure that justice be done upon him if guilty. Such persons have no other sureties than the four walls of the prison.* It is a singular fact, that, by the ancient common law, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction in almost every case.* But the power of bailing in treasons and felonies, and in other cases, was taken away by statute, as early as the reign of Edw. I.†

* 4 Bl. Com. 295.

† 8 Edw. I, c. 15.

The rule above laid down, that no justice of the peace can admit a man to bail who is charged with a capital offence, is without an exception in Massachusetts. The other branch of it, *viz.* that he is bound to admit to bail all persons charged with offences not capital, is equally true in this state. There is one case, however, where the duty of the magistrate to admit or refuse bail, requires to be well considered ; and that is, where the prisoner is charged with an offence, the punishment for which is confinement to hard labor for life, in the state prison. It was the opinion of one respectable judge of our bench,* that this offence was not bailable ; and he expressed himself to that effect on the bench when sitting at *nisi prius*. No decision or opinion of the other judges is recollected. It is a subject worthy of legislative provision. The magistrates have, in practice, hitherto met with little trouble in this branch of their duty ; for the persons brought before them, charged with offences for which this severe punishment is inflicted, are usually such as are incapable, from their poverty and low condition, of procuring sufficient sureties in the sums at which the magistrates are justifiable in fixing the penalty of the recognisance ; which sum is usually, as it ought always to be, so high as to induce the appearance of the party, if sureties should be procured.

The authority of a justice of the peace in this state, to commit or bail an offender, is derived from the statute of the 16th of March, A. D. 1784,† which enacts, that “justices of the peace shall commit to prison all persons guilty, or suspected to be guilty of manslaughter, murder, treason, or other capital offence ; and to hold to bail all persons guilty, or suspected to be guilty of lesser offences, not cognizable by a justice of the peace ; and require sureties for the good behaviour of dangerous and disorderly persons.” It will be observed that *manslaughter* is one of the offences enumerated in this statute, for which a person guilty, or suspected to be guilty, shall be committed to prison. Manslaughter is not a capital offence by the laws of this commonwealth. But when a person, charged with a homicide, is brought before

* The late Judge Sedgwick.

† Statute 1788, chap. 51.

a justice of the peace, he cannot undertake to decide whether the crime be murder, manslaughter, or any other species of homicide ; his duty is to commit the offender, and leave him to take his trial in the due course of law, or to apply to the Supreme Court, or to a judge in the vacation, for a *habeas corpus*. This construction was given to the last mentioned statute in the case of the *Commonwealth v. Loveridge*.^{*} In that case it was decided, that a recognisance taken by a justice of the peace, conditioned for the defendant's appearance, &c. to answer to such matters and things as should be objected against him, on behalf of the Commonwealth, *and especially to the complaint of J. C. &c. for killing J. C. sen. late of &c.* is merely void, by the said statute ; and that any recognisance taken by a justice of the peace, from one *charged with homicide*, is void. This decision is in conformity to the principles and modern practice of the common law ; which, as we have seen,[†] allows no discretion to a justice, when a homicide has been committed, to admit the offender to bail, though it may appear to the justice that the homicide was by misadventure, or even in self-defence ; unless indeed it appears in the clearest manner, that the charge is malicious, as well as groundless.

This duty of the justice of the peace to commit, in every case, persons charged upon oath with a capital crime, or upon facts which may amount to a capital crime, seems to require no further explanations. With respect to his duty in refusing bail to persons charged with an offence, the punishment for which is confinement to hard labor for life, until there has been some judicial decision, or legislative provision upon the subject, every magistrate must decide according to his best opinion and judgment. Burglaries and robberies, unaccompanied with an assault, and not committed with a dangerous weapon, and certain offences against the statute, for the punishment of forgery and counterfeiting, are among the offences of this description. They are crimes of the most dangerous tendency, and are punished capi-

^{*} 11 M. R. 337.

[†] Ante ; 2 Hale, 121 ; Hawk. b. 1, c. 29 ; 1 Chit. C. L. 89.

tally in most other countries. Whenever therefore, in any of these cases, a justice may be of the opinion, that he is not at liberty to refuse bail, when tendered, with such sureties as he can have no doubt are sufficient, he ought, and safely may, require bail in such a sum, and sureties of such unquestionable responsibility, as in most cases it will be difficult or impossible for the party to procure; and it is apprehended, that when a justice of the peace, in such cases, acts according to his best discretion, and without partiality or malice, he will be fully justified.

With respect to all inferior offences, justices of the peace must, by the statute last quoted, admit to bail all persons who are charged with them, and brought before them for examination.

By an act of Congress, of the 24th of September, 1789, and by another act of the 2d of March, 1793, authority is given to take bail for any crime or offence against the United States, except where the punishment is death, to any justice or judge of the United States, and to any chancellor, judge of the Supreme or Superior Court, or first judge of any Court of Common Pleas, or mayor of any city, of any state, and to any *justice of the peace*, or other magistrate, of any state where the offender may be found; the recognisance taken by any of the persons authorized, is to be returned to the court of the United States having cognizance of the offence; and on refusal to enter into such recognisance, the magistrate, before whom the same shall be refused, may imprison the person so refusing. When the punishment, by the laws of the United States, is death, bail can only be taken by the Supreme or Circuit Court, or by a justice of the Supreme Court, or a judge of the District Court of the United States.

By the laws of Pennsylvania, no person who shall be charged with horse-stealing, on the direct testimony of one witness, or who shall be taken with the horse &c. in his possession, shall be admitted to bail, otherwise than by one or more justices of the Supreme Court.* And by the same laws, no person, accused of burglary, robbery, and certain other odious offences, or as accessory thereto before the fact, shall be admitted to bail, but by

* 2 Str. 1216; 1 Smith's Laws of Pennsylvania, 581.

the judges of the Supreme Court, or some one of them.* And justices of the peace, in that state, have full power to take all manner of recognisances, as any justices of the peace of Great Britain may, can, or usually do ; all which shall be made to the commonwealth, and certified to the court in which the offence is to be tried.† And a justice of the peace, having once committed the prisoner, (unless for further examination,) cannot bail him. His application for relief, in such case, must be by *habeas corpus*.‡

It is laid down, that in all cases where one justice by his warrant can apprehend, he may bail, in cases where bail is allowable, and that the concurrence of two magistrates is not necessary. It is otherwise by the statute of Philip and Mary, in cases of felony.§

A justice of the peace, in this state, cannot hold one to bail for an offence which may be prosecuted *qui tam*, as well as by indictment. In the case of the Commonwealth *v.* Cheney,|| Chief Justice Parsons, in delivering the opinion of the court, says, “the statute creating the offence has so appropriated the forfeiture, and prescribed the mode of recovering it, as by necessary implication to exclude the offence. No man is liable to be imprisoned, or held to bail, to answer to the Commonwealth, unless, when he shall appear to answer, the Commonwealth shall have an *indefeasible* right to prosecute him. The defendant may be prosecuted either by indictment, or information *qui tam*. When the defendant has been held to bail, or imprisoned for want of it, a common informer may afterwards file his information, and defeat the Commonwealth of their right to compel the defendant to answer to an indictment, found after the filing of the information.|| The information might also have been filed before the complaint was

* 3 Smith's Laws of Pennsylvania, 187 ; 4 Do. 334 ; 2 Bache's Manual, 147.

† 1 Smith's Laws of Pennsylvania, 187 ; 2 Bache's Manual, 146, 148.

‡ 1 Smith's Laws of Pennsylvania, 5.

§ 6 Mod. 179 ; 1 Chit. C. L. 27. || 6 M. R. 348.

|| *Quare*—would not the institution and pendency of the process before the justice, be a bar to the *qui tam* action, if properly pleaded ? I think it would.

made to the justice, which might not be known either to the justice, or the defendant, and of which they could regularly have no knowledge ; and the justice might, in such case, proceed to imprison the defendant for want of sureties, when no prosecution could be maintained by the Commonwealth." When a statute comprehends an offence which may be prosecuted, as well by action or information *qui tam*, as by indictment, and where the regular commencement of the *qui tam* prosecution will defeat a prosecution by indictment, it appears by the decision last quoted, that no person can be held to bail, or be compelled to find sureties, to answer to such an offence. This decision appears to be grounded upon a principle of the common law, that no man can be lawfully arrested, unless charged with such a crime as will justify the holding him to bail when taken.* And this decision is to be the rule of conduct for all justices of the peace in this state, in all prosecutions upon statutes, where the mode of recovering the penalty is, as well by action *qui tam*, as by indictment ; as in cases of usury, &c.

A justice of the peace has no authority to require a recognisance from one charged as the receiver of stolen goods, to the party from whom the goods were stolen, to secure the payment of treble damages, given by the former statute of Massachusetts, passed in 1784, c. 66. Although this statute is now repealed, and that now in force for the punishment of larceny has substituted another remedy for the party injured, instead of the treble damages given to him in the former statute, yet as the case, in which the above point was decided, contains an exposition of the power of justices of the peace in taking recognisances, a statement of the case, and of the opinion of the court, is here inserted.

The case referred to is Vose, plaintiff in review, *v.* Deane & al.† which was a suit upon a *scire facias*, brought by the defendants in review upon a recognisance entered into by Vose to Deane & al. before a justice of the peace as surety for one J. H., charged before a justice of the peace as the receiver of stolen goods, the property of Deane & al. The recognisance was conditioned for the appearance of J. H. at the next term of the court, to answer to the charge ; and was intended to secure to

* 4 Bl. Com. 286.

† 7 M. R. 280.

Deane & al. the payment of the treble damages in case of J. H.'s conviction. It was contended by the counsel for Vose, that there was no authority in the magistrate to take this recognisance ; that whatever authority the justice had, must be by statute ; that the statute, which relates to the subject, conferred no such authority ; and that, therefore, the act of the justice was merely void ; and of this opinion was the court ; which was delivered by Sedgwick J. to the following effect. "The only question necessary to be determined is, whether the justice, who took the recognisance, was authorized to take it. It cannot be necessary to prove that a ministerial officer can do no valid act, but what he is expressly, or by necessary implication, authorized to do. In this case it is not pretended that the justice was *expressly* authorized to take a recognisance to the party injured, to secure the treble damages ; and he has no such power by implication. The statute enacts, that the party charged with theft, when admitted to bail, shall not only recognise to the Commonwealth, but that he shall enter into another recognisance &c. to the party injured, for treble the value of the articles which he shall be charged with stealing. In this case J. H. was not charged with *theft*, but a crime perfectly distinct from theft, although connected with it. This then is not a case in which such authority is given. Nor is such authority given by the statute of 1783, which authorizes justices of the peace to hold to bail all persons guilty, or supposed to be guilty, of offences less than capital, and which are not cognizable by a justice of the peace. This statute (preceding that of 1784), by authorizing the *holding to bail*, did not comprehend a power to take a recognisance to the party injured for his treble damages ; *bail* being intended as security for the appearance of the person charged with a crime, at the court to which the recognisance was to be returned. The judgment entered by order of court was that the recognisance, upon which the judgment complained of was rendered, is null and void ;" and that said Vose be restored, &c. &c.

A justice of the peace cannot bind the putative father of a bastard child, by way of recognisance, but only by *bond*. This point has also been decided in two cases, in the Supreme Court

of Massachusetts. The first case was *Johnson v. Randall* ;* which was a suit upon *scire facias*, praying for execution upon a recognisance entered into by Randall to the plaintiff, before a justice of the peace, conditioned to appear, &c. and answer to the plaintiff on a charge of being the putative father of a bastard child. There was a demurrer for causes, and joinder, on which the plaintiff below had an award of execution. While the argument was proceeding, the court observed to the plaintiff's counsel, that he could not support his declaration, it not appearing from the record that the justice had returned the recognisance where it should by law be entered of record ; that a *scire facias* upon a recognisance must be sued in the court where the recognisance was recorded ; that justices of the peace, taking recognisances for the appearance of a party, must return them to the court where the recognisor was to appear ; and if, from the jurisdiction of that court, it could not award execution upon a *scire facias*, it ought to certify the recognisance to some court, where such execution could be awarded ; and if a court refused to certify a recognisance, without sufficient cause, the Supreme Court could compel it by *mandamus*. Other proceedings were had in the case ; after which Parsons C. J. said, that the point made by the defendant's counsel had been before the court in the case of *Merrill v. Prince*,† when the court were clearly of opinion, that a justice could only bind a putative father of a bastard child to answer by requiring a *bond* from him, and not a *recognisance*. The statute mentions a *bond*. And when the condition of a bond is broken, the court may relieve against the penalty upon equitable terms ; but not against a recognisance, if it be forfeited.

In the case of *Merrill v. Prince*, the same point was decided, viz. that the security to be taken by a justice of the peace, of one accused as the putative father of a bastard child, must be by *bond*, and not by recognisance. The following remarks, in substance, were made by Chief Justice Parsons, in delivering the opinion of the court in that case ; that the pregnant woman, un-

* 7 M. R. 340.

† 7 M. R. 396.

der the provisions of the statute of 1785, c. 66, may complain to a justice of the peace, who may thereupon cause the party accused to be brought before him on a warrant, and may bind him, with sufficient sureties, to appear and answer at the next Court of Common Pleas. As a party may be bound with sureties, as well by recognisance as by bond, if the statute had not explained in what manner the accused is to be bound, perhaps the mode of binding might be at the option of the justice, unless upon general principles it might be supposed to be confined to recognisance. But there is further provision, that if the woman be not delivered, or be unable to attend at the next court, the court may, unless the sureties object, order the continuance of his *bond*, which order, entered on record, shall have the same effect, as a recognisance to appear at the next term. The legislature have, therefore, defined the manner of binding over with sureties the party accused, to be by his *bond* to the complainant, and not by recognisance. And in this the legislature have acted wisely; for the party cannot be relieved against the condition of the recognisance, but he may be against the penalty of the bond. If, therefore, the recognisance is forfeited, the woman may recover the whole sum in which the accused was recognised. But if he be bound by bond, although the condition may be broken in law, yet the court may relieve against the penalty, on the payment of nominal damages, if the complaint be found false, or other security given for the maintenance of the child; or the penalty may be reduced so as to cover and be a security for that maintenance.* The judgment of the court in this case was, that the plaintiff could not recover, upon the ground that the justice was not authorized to take the recognisance.

There have been other decisions in the Supreme Court of Massachusetts, which have relation to that branch of the duty of a justice of the peace, which appertains to the taking and certi-

* Since the decision in the above cases, a statute has been passed, authorizing the courts to remit the penalty of recognisances, in whole, or in part, and upon such terms as the court shall consider equitable and just; but this statute is confined to cases of recognisances taken or entered into in criminal prosecutions.—Statute 1810, chap. 80.

fyng recognisances, and which fall within the subject of this chapter.

In a recognisance entered into before a justice of the peace, it must appear in the condition, that the justice had jurisdiction in the cause therein referred to; and for what cause it was taken. In the case of *Bridge v. Ford*,* the cause of taking the recognisance did not appear so as to show that the justice had jurisdiction of the case in which it was taken. The court cannot conjecture in what manner the process was instituted, or what was the cause of it, or whether it was a cause within the jurisdiction of a justice of the peace. Nothing is to be presumed in favor of the jurisdiction of an inferior magistrate, which, in general, is given and limited by particular statutes. In every recognisance, the justice ought to recite so much of the complaint, or cause of taking it, as to show that he has authority to take it. For if it were not within his jurisdiction, the proceedings as well as the recognisance are void. This case of *Bridge v. Ford* was afterwards brought before the court and decided.† And the same principles were then adhered to and affirmed; and upon one of the causes of demurrer then filed to the new counts, the declaration was adjudged bad, because it did not appear that the recognisance was ever transmitted by the justice to the court appealed to, and there entered of record, as it ought to have been.

A justice of the peace taking a recognisance for appearance, must return the same to the court where the recognisor is to appear. And if such court has not power to award execution upon *scire facias*, it must certify the recognisance to some court where such execution can be awarded.‡ As by the statute of 1783, c. 51, the Court of Sessions were to certify a recognisance returned there by a justice of the peace, to the Common Pleas, if the recognisance be forfeited, with a record of the default of the conusor, where it should be entered of record.

A recognisance taken before a justice of the peace, for keeping the peace and being of the good behavior, (and all other recognisances, it is apprehended,) should be taken returnable to

* 4 M. R. 642, 643.

† 7 M. R. 209.

‡ 7 M. R. 340.

the *next* Court of Common Pleas, and when taken on a charge for an offence which is bailable, should be made returnable to the next court having jurisdiction of the offence.* In the case of the Commonwealth *v.* Ward,† the condition of the recognisance was, that the party should keep the peace, and be of the good behavior, “for and during the term of two years from the date,” and for want of finding such sureties, he was thereupon committed by the justice. Upon a *habeas corpus*, returnable *instantly* in this case, it was said by the court, that there was no complaint recited, or referred to; which ought always to be done for the information of the court, upon the return of a *habeas corpus*. The justice has wholly misconceived his duty. For when one is brought before a justice of the peace, on articles of the peace exhibited against him, the justice, if satisfied that there is ground for further proceedings, is to order him to recognise &c. for his appearance at the *next* Court of Common Pleas, and in the mean time to keep the peace and be of the good behavior towards all the citizens of the commonwealth, and especially towards the complainant. And when one is charged with a bailable offence, and on examination the justice is of opinion that there is sufficient cause, he is to take a recognisance for his appearance to the *next court* having jurisdiction of the offence charged. In the present case, the prisoner was required to find sureties for the peace for the term of two years, which was altogether beyond the authority of the justice.‡

There is one rule in these cases, which all justices of the peace ought to be governed by, and act accordingly; and that is, that in all cases, where the courts of Common Pleas have concurrent jurisdiction with the Supreme Court of the offence charged, the justice ought to bind over the party, and take his recognisance, returnable to the *Court of Common Pleas*, unless there are special and important reasons for binding him over to the Supreme Court. There are many reasons for this course; some of which are, that it is in favor of the party accused, by giving him the chance of two trials; which he cannot have in the

* 4 M. R. 497.

† Id.

‡ 4 M. R. 497.

Supreme Court, if he be originally charged and tried in that court. The Court of Common Pleas, as it is now (and doubtless hereafter will be) constituted, in this state, is composed of judges fully competent to the investigation and decision of all questions that may occur on the trial; and the jury, in the Court of Common Pleas, are selected from the same class of citizens, as those which compose the jury in the Supreme Court. Another and important reason is, that there are a greater number of terms in the year of the Common Pleas, than of the Supreme Court, and whenever an innocent party happens to be accused, the opportunity for an acquittal, and the vindication of his character, more frequently and speedily returns; to all which it may be added, that the weighty and important business usually pending in the Supreme Court ought not to be interrupted or delayed by the trial of causes which may be fully and fairly heard and decided in the lower courts. The authority for these remarks is the frequent opinion and direction of the judges, upon this subject, expressed in their charges to the grand jury.

Among other important considerations, as to this branch of the duty of a magistrate, is that of deciding upon the *sufficiency of the bail*, and the amount of the penalty of the recognisance. These must necessarily be left, in a great degree, to the discretion of the magistrate. It is said, and so is the common practice, that the sureties ought to be, at least, two men of sufficient ability.* But where the party charged is himself a responsible person in point of property, and one surety of equal and unquestionable responsibility is offered, there can be no danger, in common cases, of accepting them, and not requiring two sureties. But whenever the justice accepts one surety only, there ought to be no doubt of the sufficiency of his property to answer the penalty of the recognisance. And in such case, the character and place of residence of the surety ought to be taken into consideration. It is also an indispensable rule, that each of the sureties ought to be severally of sufficient ability and property to answer the sum in which he is bound. The ability and quality of the

* 1 Chit. C. L. 99.

prisoner, and the nature of the crime, should always be taken into consideration in determining upon the sufficiency of the sureties, and the sum in which they are to be held to recognise.

As there is great responsibility upon the magistrate in these cases, he may, in order to ascertain to his satisfaction the ability of the sureties, examine them upon oath as to the value of their property. It is every day's practice, in the higher courts, to do this. And it is the more reasonable, because there are no regulations by any statute, respecting the amount of bail to be required by a justice of the peace. One rule should be uniformly adopted; and that is, to require such sureties as are possessed, in their own right, of a clear real estate within the county, to such an amount, as that, upon a sale of it at public auction upon a warrant of distress, the full amount of the sum in which the surety was bound may be certainly realized. Sureties not possessed of such real estate may, doubtless, in some instances, be safely taken by the justice: but in all cases, sureties possessing, under a clear title, real estate in the county in which the recognisance is taken, ought to be preferred. Personal estate is so fluctuating, and may be so easily kept from the possession of an officer, and transferred from the possessor into other hands, that it affords no such security for the penalty of a recognisance, as real estate. And the will of the legislature is expressed to this effect, by the provisions of a statute upon this subject, which are very salutary and in full force. It was among the first laws passed after the adoption of the present constitution of this state; it was passed on the 2d of October 1782; chapter 19, the 7th section of which is in these words: "That the lands and tenements of all persons, recognising to the use of government, before any authority duly authorized and empowered to take the same, are and shall be liable to respond the sum mentioned in the recognisance, from the time the same is taken and acknowledged, notwithstanding any transfer or alienation thereof."

It is manifest, that unless proper caution is made use of by magistrates upon the subject of requiring such sureties, upon taking a recognisance, as will be of sufficient ability to respond the sums for which they become bound, the whole object of a

public prosecution may be defeated, and the guilty escape and go unpunished. It is said that persons convicted of an infamous crime, as perjury, cannot be admitted as an adequate surety.* An attorney is not prohibited from thus assisting his client, in a criminal case.† A married woman cannot be bound by recognisance, because it is not capable of being estreated.‡ She can no more enter into his bond, than she can into any other while she is a *feme covert*. A minor cannot be accepted as surety, or enter into a recognisance as principal, because he cannot bind himself during his minority. In cases both of married women and minors, they must procure some persons to recognise for them as principal, and other persons as sureties to such principal.

It is said that if, after inquiry by a magistrate upon the oath of the sureties, he finds he has been deceived, he may require fresh and better sureties; and may commit the party on his refusal; for that insufficient sureties are as no sureties.§ But justices must take care, that, under pretence of demanding sufficient sureties, they do not make so excessive a demand as to amount in effect to a denial of bail; for this has been complained of as a great public injury, and, as may be recollected, is specially provided against in our declaration of rights.||

In general no notice of bail before justices of the peace is requisite. Yet some of the provisions of the statute of 30 Geo. 2d, requiring notice in certain cases to be given to the prosecutor, of the names and places of abode of the persons proposed as bail, are very salutary. And when a person is brought before a justice of the peace upon a warrant issued by the Supreme Court, or Court of Common Pleas, upon an indictment found in these courts respectively, to be bailed upon such warrants, unless the persons proposed or offered as bail shall be well known to the justice, and he shall approve them, notice of the persons offered as bail ought to be given to the complainant or to the public

* 4 T. R. 440; 1 Chit. C. L. 100. • † Dougl. 466.

‡ Hawk. b. 2, c. 15, s. 84.

§ Hawk. b. 2, c. 15, s. 4; Dalt. c. 70 & 114.

|| Hawk. b. 2, c. 15, s. 5.

prosecutor, that they may have an opportunity of inquiring into their sufficiency, and if they are not satisfactory, of opposing them.*

If the party is not ready with bail, at the time he is apprehended and examined, and the offence is bailable, he may, at any time before conviction, be released from imprisonment, on finding sureties.† And after the recognisances have been entered into, the justice, before whom the transaction takes place, will send notice of the fact to the gaoler, and an order to liberate him.‡ And it is said that justices of the peace may send a prisoner, for a short time, to some private person, to afford him an opportunity, when necessary of procuring bail before he is committed for trial; but this practice has been disapproved of as inconvenient and not agreeable to law.§ The practice, however, of permitting the prisoner to remain a short time before his final commitment, in the custody of an officer, to afford him this opportunity, is very reasonable, and liable to no serious objection. A faithful officer will be careful, in such case, not to suffer an escape; and the party thereby may be prevented from the inconvenience and expense of a commitment, in some cases, where his bail, when procured, would be ample security for his appearance to take his trial.

The offence of denying, delaying, or obstructing bail, is a misdemeanor by ancient statutes and at common law, and is punishable thereby as an offence against the liberty of the subject, not only by action at the suit of the party wrongfully imprisoned, but also by indictment.|| By the statute of Westminster, 1. c. 15, it is enacted, “that if any withhold prisoners that are releasable, after they have offered sufficient sureties, they shall pay a grievous amercement to the king. And if they take any reward for their delivery of such, they shall pay double to the prisoner.”

By the statutes 3 Ed. 1, and 1 & 2 Ph. & Mary, and 2 & 3 of Ph. & Mary, magistrates are punishable for improperly taking bail in cases where the offence is not bailable; and the admitting

* 1 Chit. C. L. 101. † 1 Burr. 460; Hawk. b. 2, c. 16, s. 1, n. 1.

‡ Dick. J. Bail VI; 1 Chit. C. L. 101. § 1 Chit. C. L. 101.

|| Hawk. b. 2, c. 15, s. 13; Dalt. c. 114.

of bail, where it ought not to be taken, is liable to be visited as a negligent escape at common law.* So on the other hand, the offence of taking insufficient bail, subjects the offending parties to punishment. And although the prisoner, who is bailed by insufficient sureties, actually appears according to the condition of his recognisance, yet if such insufficient sureties were taken corruptly, the magistrate would continue liable on an indictment.†

When the magistrate has concluded the examination, and there appears sufficient or probable ground to suppose that the prisoner is guilty, and that the offence is to be tried in the higher courts, he is to take the recognisance of the prosecutor and other witnesses, to appear and give evidence at the next court having jurisdiction of the offence; and in case of refusal may commit them to gaol.‡ In England the prosecutor is bound by his recognisance to appear and prefer a bill of indictment at the court to which the recognisance is returnable, as well as to give evidence in the case.§ But this is not the practice in this commonwealth. The prosecutor, or, as he is generally called here, the complainant, is recognised in the same manner, and in a recognisance of the same nature as the other witnesses. In his character as a complainant, he being generally (though not always) the injured party, he assumes no peculiar or greater responsibilities, and is liable to no other or different duties or disabilities, than any of the other witnesses, excepting in cases in which he may be interested, by becoming entitled, upon the conviction of the party, to a share of the penalty to be recovered.

The witness or party, whose recognisance is to be taken, need not sign it; but the justice makes a record of it, a copy of which is afterwards made out and subscribed by the justice before whom it is taken. It becomes a matter of record as soon as taken and acknowledged, although not made up or entered at large by the justice, but only entered in his book.||

When it appears from the examination, that a person, brought

* Hawk. b. 2, c. 15, s. 7; Bac. Abr. Bail. G. H.

† 1 Chit. C. L. 102, and authorities there cited.

‡ 1 Hale, 566; 2 Hale, 52. § 1 Chit. C. L. 89, 90.

|| Dalt. J. c. 168; 1 Chit. C. L. 90.

before the magistrate as a witness, may probably be able to give material evidence against the prisoner, it is his duty to bind such witness by recognisance to appear at the court in which the prisoner is to be tried. And, as we have seen, if the witness refuse to enter into the recognisance, the magistrate has power to commit him. This power is virtually included in his commission, and is by necessary consequence, incident to the power of taking the examination and binding over the party and witnesses. When infants and married women, who cannot legally bind themselves, are required to appear, they must find others to be bound for them.* This doctrine was confirmed in a late case, where a married woman refused to enter into a recognisance for her appearance to give evidence against a felon; and the magistrate committed her; and it was held by the court of King's Bench that the commitment was legal.†

It is not necessary, or convenient, to take a separate recognisance for each witness. They may all be bound in one recognisance. And when separate recognisances for each witness have been taken and certified, there has, in some cases, been no other reason for it, than that of charging the fee for each of them.

Every recognisance, taken by a justice of the peace, must be to the commonwealth, and ought to contain the name, place of abode, and addition or calling, both of principals and sureties, as well as the sums in which they are bound.‡ The authority of justices of the peace, in this state, to take recognisances, is derived from the statute of 1783, chap. 51. But in all cases, it is by reasonable intendment of law, as well as by the express power given them, that they exercise this authority. And when the party, bound by recognisance, is prevented by the act of God, from appearing according to its condition, the court cannot *discharge* the recognisance, but may respite it till the next term.§ If there exist a legal excuse for the non-appearance of the party, it ought to be shown upon the *scire facias*, issued in due course

* Burn. J. Examination; 1 Chit. C. L. 90. † 3 M. & S. 1.

‡ Burn. J. Recognisance. § 11 Mod. 200; Dalt. J. Recognisance.

of law, to recover the penalty ; whereby the whole matter will appear upon record ; and the facts, when necessary, tried and decided upon by a jury, or inquired into by the court, upon application to them for a remission of the penalty. This power of the court to remit the penalty, or any part of it, is by virtue of a recent statute of this commonwealth, stat. 1810, chap. 80. At common law, it is said, the judges of oyer and terminer are the proper judges, whether recognisances ought to be estreated or *spared* ; and that it is for the benefit of public justice, that they should have such power, if upon the circumstances of any case they should see fit to exercise it.*

The condition of the recognisance, both of the party and witnesses, ought not to be general to appear and answer, &c. The recognisance of the party ought to mention the particular crime for which he is bound over to take his trial ; and not generally to answer to such matters and things, as shall be then and there objected against him, and in the mean time to keep the peace, &c. If he is to be tried for larceny, for instance, it ought to be so specially stated in the condition of the recognisance ; and the name of the person, upon whose complaint he is charged, ought also to be mentioned in the recognisance. And the same particularity is also requisite in the recognisances of witnesses. It should be stated, that they are to appear and give evidence in the case of the Commonwealth against the party charged, upon the complaint of the prosecutor, naming him, for the offence, whatever it may be, stating what the offence is. If the recognisance only state, that the witness is to appear and give evidence on behalf of the Commonwealth, not stating in what case, or against whom, or upon what offence, it will be informal, and perhaps invalid.†

When the examination is finished, and before the parties and witnesses separate, it is the duty of the justice to enjoin upon them, *particularly the witnesses*, to appear at court on the morning of the first day of the session, that no time may be lost by the grand jury and public prosecutor on account of their absence

* Dalt. J. Recog ; 10 Mod. 152.

† 4 M. R. 497, Commonwealth v. Ward.

or negligence. Great embarrassment, expense to the public, and waste of time, are frequently the consequence of the neglect of this duty on the part of the magistrate. It is very common for justices of the peace, officers, and others, to misinform and mislead the witnesses in this particular, by telling them that they will not be wanted until the second day of the term ; that little or no business will be done at court until the second day, &c. So far from this being generally true, the witnesses, by a punctual attendance on the first day of the term, may often be examined and dismissed on the morning of the second day. By their neglect to appear punctually on the morning of the first day of the term, their bonds are forfeited, and they may by law be compelled to pay the whole penalty of their recognisance. Witnesses are frequently brought into this difficulty by the misinformation of the justices themselves ; and whenever that is the case, these justices are liable for all the consequences, to the witness or party whom they thus mislead. It is therefore an important duty of the magistrate, that he should give notice to, and particularly inform, all those who enter into recognisance before him, either as parties or witnesses, that their duty and the condition of their recognisance require, *that they should make their appearance at court, at the hour that it is usually opened, on the morning of the first day of the term.* This can always be done by the magistrate, without inconvenience, before the parties and witnesses are dismissed, and at the moment when their recognisances are taken. *There is no excuse for a justice of the peace,* who undertakes to dispense with the attendance of witnesses at court, at the time that their duty and the public business require their presence. Instances have often occurred, even in prosecutions for a capital offence, when the witnesses have not appeared at court until the second day of the term, and have pleaded in excuse, the information of the magistrate to them, that they would not be wanted until that time. This is a great breach of duty on the part of the magistrate, and generally subjects the persons thus misinformed, as well as the public, to delay, embarrassments, and unnecessary expense. It is also a contempt of the court, for which justices are liable to be fined.

CHAPTER VI.

THE COMMITMENT.

WHEN a person is apprehended for an offence that is not bailable, and there appears any ground for the charge ; and when the charge is for a bailable offence, and the party neglects to offer sufficient bail, he must be committed.* The *mittimus* is a warrant of commitment to the gaoler to receive the defendant.

The magistrate, who has power to examine or try the defendant, has also, as incident to his offence, power to commit him. The statute, "vesting certain powers in justices of the peace in criminal cases,"† which enables justices of the peace to examine into the crimes and offences therein enumerated, also enables such justices to commit the persons charged when the offence is not bailable, or when sufficient bail is not offered.

The first inquiry is, to what prison shall the defendant be committed? By the statute last quoted, justices are commanded to commit to *prison* persons guilty, or suspected to be guilty, of capital or other offences. The prison, here intended, is unquestionably the common gaol of the county in which the offence is committed. No other prison could be intended by the legislature ; for whenever a magistrate is authorized or commanded to commit an offender to any other prison, as for instance, the house of correction, it is so particularly directed in the statute which creates the offence, and points out the punishment. And the party ought to be committed for trial to the common gaol of the county, in which the offence was committed, and the warrant granted, though backed in another county.‡ If a person commit a crime in one county, and be there arrested, and afterwards escapes into another county, and be arrested in the latter county, he may be brought before a justice of the county where the

* Hawk. b. 2, c. 16, s. 1, & s. 3. † Stat. 1783, chap. 51.
 ‡ 1 Chit. C. L. 107, 108 ; Hawk. b. 2, c. 16, s. 6—10.

crime was committed, and be by such justice committed to the gaol of such county. By the statute of Massachusetts of 1820, chap. 52, where the offender, either before or after the issuing of the warrant, shall escape from the county in which the offence is committed, he may be pursued and apprehended in any other county of the commonwealth, and be conveyed back into the county in which the offence was committed, and may be there committed to the prison of such county, either if the offence be not bailable, or if the party refuse to offer sufficient bail. The course of proceeding under this statute is very plain and convenient. There seems to be no difficulty in executing its provisions in such a manner, as that the absconding party may be always conveyed back, and imprisoned in the county in which his offence may have been committed, without the formality and expense of a *habeas corpus*, or the old method of backing the warrant.

But it is every day's practice, when an offender has committed an offence in one county, and flies into another before he is taken, to arrest him in the county where he has taken refuge, and there to bring him before a justice to be by him committed to the common gaol of such county, unless there be some special reason to the contrary; as when there is an apparent danger that the party may be rescued. And it is also laid down, that an offender may be committed to the gaol next to the place where he is taken, whether it lie in the same county or not.* When either of the courses last mentioned is adopted, the officiating magistrate ought to give immediate notice thereof to the Attorney General, or public prosecutor, that he may seasonably obtain an order of court, or *habeas corpus*, for the removal of the offender into the county where he is to be tried.

The reason, why persons charged with crimes should be committed to the gaol of the county, is, not merely that they can generally be more safely kept there, but also that they shall be in the keeping and custody of the sheriff.

The house of correction, in the several counties, is also a prison, to which justices of the peace are to commit certain offend-

* Hawk. b. 2, c. 16, s. 8, and the authorities there quoted; Id. s. 6.

ers. By the statute for suppressing and punishing rogues, vagabonds, &c.* it is enacted, that houses of correction shall be provided in every county of the commonwealth, for the purposes stated in the statute ; and that, until such houses of correction be erected, the common prison in each county may be made use of for that purpose. To this prison, it is the duty of justices of the peace to commit all rogues, vagabonds, and idle persons, of the character and description contained in the second section of that statute, to be kept and governed according to the rules and orders of such houses.

Although the form of the *mittimus* does not, perhaps, require as much precision as an indictment or complaint, yet it must be framed with sufficient accuracy ; and the reason given for this particularity is, that if it be otherwise, and the party prosecuted escape, the officer may not be punishable ; and also, that if he be brought before the court by *habeas corpus*, the court ought to discharge or bail him.† Lord Hale, however, seems to be of a different opinion.‡ The formal requisites of a commitment appear, by the most approved authorities, to be the following.

1. Every final commitment must be in writing, and under the hand and seal of the magistrate, and show the time and place of making it.§ A magistrate, however, may, by parole, order a party to be detained a reasonable time, until he can draw out a formal commitment.|| And it is said, that though advisable, it is not absolutely necessary to state, that the commitment was made by the justice in that character ; for though his authority does not appear at the beginning of the *mittimus*, it may be supplied by averment.¶ In order, however, to show the jurisdiction of the magistrate to take cognisance of, and commit for an offence perpetrated out of his county, when the party has been apprehended there, as in the case of a person arrested in one county, for an offence committed in another, it is said to be usual to state the fact in the commitment.**

* Stat. 1787, chap. 54.

† Hawk. b. 2, c. 16, s. 16 ; 1 Chit. C. L. 109.

‡ 2 Hale, P. C. 122.

§ 2 Hale, 122 ; Hawk. b. 2, c. 16, s. 18.

|| 2 Hale, 121, 122 ; 1 Chit. C. L. 109 ; 7 East, 537.

¶ 2 Hale, 122.

** 1 Chit. C. L. 109.

2. It is said in Hawkins, and other English authorities, that the *mittimus* may be made either in the King's name, or that of the justice awarding it; and that the latter is the most usual.* But there seems to be no propriety or authority for issuing a precept in the name of the justice. He is the mere instrument or organ of the Commonwealth, to enforce its laws and commands, and whatever he does, in his official capacity, ought to be done in the name of the Commonwealth. The *mittimus*, therefore, ought to be made in the name of the Commonwealth.

3. The *mittimus* should be directed to the sheriffs and constable, and to the gaoler and keeper of the prison, and be generally to carry the party to prison.† When thus directed, it commands the former to convey the prisoner into the custody of the latter, and the latter to receive and keep him.‡

4. The prisoner should be described by his name, if known; and if not known, then it may be sufficient to describe the person by his age, stature, complexion, color of hair, and the like, and to add, that he refuses to tell his name.§

5. The *mittimus* ought to state that the party has been charged upon oath. For although in England, it is said that a commitment for treason, or the suspicion of it, without setting forth any particular accusation or ground of it, is valid, yet in this country no criminal process can be originated, nor can any man be restrained of his liberty, but by the oath of a citizen. There may be an exception to this rule, in cases of commitments made *super visum*, or upon view of the offence, by the committing magistrate, in which cases an oath is not requisite.|| But in all cases of crimes committed upon the view, or in the presence of a magistrate, whatever may be his authority to punish them, it is more fit and proper that he should act the part of a witness, rather than of a magistrate; and that he should enter his complaint and procure a process from another justice.¶

* Hawk. b. 2, c. 16, s. 14; 1 Chit. C. L. 109.

† Hawk. b. 2, c. 16, s. 13. ‡ Burn. J. Commitment.

§ Burn. J. Commitment, 111; See ante, as to warrant against an unknown person.

|| 1 Leach, 167; 1 Chit. C. L. 110.

¶ See ante.

6. But it is necessary to set forth the particular species of the crime, alleged against the party, with convenient certainty, by whatever authority the commitment is made.* If it be for felony, it must contain the species of felony, as "for felony of the death of J. S. or for burglary in breaking the house of J. S. &c. and the reason is, that it may appear to the judges upon the return of a *habeas corpus*, whether it be felony or not."† In the case of the Commonwealth *v.* Ward, it was decided, that a *mittimus*, or warrant of commitment from a justice of the peace, ought to recite the complaint upon which it is founded; and the *habeas corpus* act contemplates that the offence shall be plainly and specially expressed in the warrant of commitment.‡ There are many reasons for requiring that the cause of commitment should be distinctly stated. For if no cause be shown, and the prisoner escape, it is said that the officer is not punishable.§ It is also said that a *mittimus* to answer such things as shall be objected against him, is utterly void and against law.|| But Lord Hale, as before suggested, held a different opinion. He observes, that though it be true, that the cause of commitment, the date, apt conclusion, &c. are regular and fit, he was far from thinking the warrant void that did not contain them; and he thought that in an action for false imprisonment against the gaoler, a justification by virtue of such a warrant would be good; and further, (contrary to the opinion of Lord Coke,) that if an escape be suffered by the gaoler upon such a warrant, it would be punishable in him.¶ It is said also in other books, that if the *mittimus* do not contain the cause of commitment; that is, if it do not recite the complaint upon which it is founded, it will be no offence under the statute for regulating prisons, to assist or enable a prisoner to escape from prison.** How far this doctrine would be carried or applied in our courts, is yet to be ascertained. It is doubtless true, that an indictment against the keeper of a prison,

* Hawk. b. 2, c. 16, s. 16. † 2 Wils. 158, 159.

‡ 4 Mass. Rep. 497. § 1 Chit. 111; and other authorities there cited.

|| Burn. J. Commitment, 111; 2 Inst. 591. ¶ 2 Hale, 122.

** 1 Chit. C. L. 111; 1 Leach, 97, 363.

either for a voluntary or negligent escape, or against any other person for conveying instruments into a prison, to assist or enable a prisoner to escape, could not be maintained, without alleging and proving that the prisoner was legally committed to the prison. Such, indeed, has been the practice in this commonwealth, in prosecutions upon the above mentioned statute. It will remain for our courts either to reconcile the opposite opinions of Hawkins, Coke, and Hale, upon this subject, or to adopt and follow that which they may deem the most reasonable and best supported.

The necessity of adhearing to the abovementioned requisites in a *mittimus*, or warrant of commitment, is manifest from some of the provisions of the statute last mentioned ;* which are, that sheriffs of the respective counties shall keep a true and exact calendar or register of all prisoners, committed to any prison under their care, in a book provided and kept for that purpose only ; in which book, shall be fairly and distinctly registered the names of all the prisoners committed to prison, with their places of abode, additions, the time of their commitment, *for what cause*, and by what authority committed ; and of such as are committed for criminal offences, a description of their persons. And by the sixth section of this statute, "every gaoler or prison-keeper, at the opening of the Supreme Judicial Court, or other court having jurisdiction of crimes and offences within the county where he keeps the gaol, shall return a list of prisoners in his custody, therein certifying the cause for which, and the persons by whom they were committed, *with the cause of their commitment*, that the justices of the same courts respectively may take cognisance thereof, and proceed to make deliverance of such prisoners, according to law, for the crimes proper to the jurisdiction of the same courts respectively ; and also shall have the said calendar or register of prisoners, ready to be inspected by the said courts." These particulars can only be made known to the sheriff or gaoler by the *mittimus* ; which ought to contain them, particularly and precisely stated, in order that the sheriff or gaoler may be

* Stat. 1784, chap. 41.

thereby enabled to make out and return his calendar of prisoners, according to the requirements of the statute.

A similar duty is required of sheriffs by the common law and practice in England, and by a recent statute.* Another reason given why a warrant of commitment should set forth the crime for which the party is committed, is, that if he be brought before the court upon a *habeas corpus*, and it does not appear by the return that he is committed for, and charged with a criminal offence, the court will either discharge or bail him. And this rule is said to apply not only where no cause at all is expressed in the *mitimus*, but also when it is so loosely set forth, that the court cannot judge whether it were a reasonable ground of imprisonment.† And therefore, if the commitment be for felony, it must not be *pro feloniam* generally, but it must contain the special nature of the felony. It is observed by Hawkins,‡ that there are precedents of commitments in good authors, for felony in general, without stating the specific accusation. In the case of John Wilkes,§ which was a commitment for publishing “a most infamous and seditious libel, entitled the North Briton, number 45, tending to inflame the minds and alienate the affection of the people from his majesty, and to excite them to traitorous insinuations against the government,” it was held insufficient, though it was urged that the libel ought to have been set forth, in order that the court, on a *habeas corpus*, might be able to determine the amount of bail. Cases are mentioned in Hawkins of this kind, where one was committed for manifold contumacy to the high commissioned court; or for refusing to answer before them to certain articles; for insolent behavior, and words spoken at the counsel board, all of which are very properly said to be not good without stating and showing the specific nature of the offences.|| It has been held that a commitment, which charged the defendant generally with insulting justices of the peace, without specifying

* 2 Hale, 122; 55 Geo. III.

† Hawk. b. 2, c. 16, s. 16; 1 Chit. C. L. 111, and other authorities there cited.

‡ Hawk. b. 2, c. 16, s. 16. § 2 Wils. 153, 159.

|| Hawk. b. 2, c. 16, s. 16, and the numerous cases there cited.

what he said or did, is good.* But this decision seems repugnant to the cases and principles laid down in Hawkins, and the other books of authority. And it is certain that such a commitment would not be sufficient in this state, after the decision in Ward's case, before quoted.†

When the facts of the case will warrant a commitment for felony (and for the same reason any other crime), the *mittimus* should not be on *suspicion* of felony; for it was said by Lord Mansfield, that on such a commitment a party has a right to be bailed under the *habeas corpus* act; and that a person who facilitates the escape of a party so committed, would not be indictable.‡ The correctness of this opinion is not readily perceived; for there is no question that a magistrate, both at common law, and by the statute of this commonwealth,§ may arrest and examine a supposed offender upon suspicion; and if so, it is his duty to commit or bail him, if the offence charged be of a capital nature, or beyond the jurisdiction of a justice to try. If then the arrest, examination, and consequent commitment, be legal, the party is no more entitled to be discharged or bailed upon a *habeas corpus*, because he was committed upon suspicion, than if he had been committed upon an absolute charge; and it should seem that the duty of the court, upon a *habeas corpus*, would be the same in one case as in the other; that is, they would exercise their power of bailing, remanding, or discharging the party, as the result of the inquiry upon the *habeas corpus* would justify, whether he were committed upon suspicion or upon a positive accusation.

Upon the subject of the present inquiry, that is, with what degree of precision the offence charged, ought to be stated in the *mittimus*, there is evidently considerable contradiction in the English authorities. The cases are collated and apparently thrown together without much order or method, in Chitty's late treatise on criminal law. Some of them are not applicable to our laws and practice. There seems to be no difficulty in pointing out or adopting a clear and rational mode of procedure in this part of

* 2 Bernard, 155. † 4 Mass. Rep. 497. ‡ 1 Leach, 98, n. a; Id. 97, 363.
§ Hab. Corp. act, 1784, chap. 72; see additional act 1806, chap. 80.

a justice's duty ; for it is suggested, or rather it is clearly settled in Ward's case ; to wit, that the crime for which the party is committed should be set forth with the same precision in the *mittimus*, that it is in the complaint ; and that for this purpose, the body of the complaint should be recited in the *mittimus*. When the description of the offence is long and very minute, as in cases of perjury, conspiracy, libel, &c. perhaps if an abstract, or the substance of the complaint, be inserted in the *mittimus*, it would not be invalid. This is always done in the *capias* which issues upon an indictment in these cases.

It is said in the English books, that if the commitment itself be informal, yet, if the *corpus delicti* appear in the deposition returned to the court, the defendant will not be bailed upon a *habeas corpus*, but remanded.* We have no such practice as taking and returning depositions, in any stage of a criminal process, unless in some particular cases of urgent necessity, when a deposition is taken at the request of the defendant, and by the consent of the counsel for the government, to be used on the trial of a cause. In all examinations before a magistrate, the evidence is given *viva voce* by the witnesses, and in the presence of the party accused. When these examinations result in a commitment, and the party thinks himself entitled to be discharged or bailed, he brings his *habeas corpus* before the Supreme Judicial Court, if in session, or some one of the justices of it, in the vacation. In the inquiry and hearing by the court or judge, the party complaining produces his witnesses, and in this manner the facts and circumstances, under which the crime was committed, are fully inquired into, and thereupon the prisoner is discharged, bailed, or remanded, as the result of the inquiry may justify.

7. The *mittimus* should point out the *place* of imprisonment, and not merely direct that the party shall be taken to prison. When the commitment is to take place in a county where there are several common or county gaols, the *mittimus* ought to direct to which of them the prisoner shall be committed ; for if

* 1 Chit. C. L. 113, and cases there cited.

the direction be, that he shall be committed to either of the gaols in the county, the officer who is to convey him to prison and execute the warrant would be authorized to commit him to the most distant as well as the nearest prison to the place where he was examined. There is no necessity or propriety in giving the officer this power ; for, in general, it is proper that the commitment should be to the nearest prison, not only with the object of saving expense, but to prevent the opportunity of escape or rescue. Whenever, through the insufficiency of the nearest gaol, or from any other cause, it is expedient to order the commitment to be made in one more distant, the magistrate, and not the officer who executes the warrant of commitment, ought to be the judge of this expediency. Many escapes have been effected, during the conveyance of prisoners from the place of examination to distant gaols, by old offenders, in the custody of inexperienced officers. And although they may ultimately be removed, from the gaols to which they are committed, to the place where they are to be tried, the danger of escape, and the expense attending their commitment, are considerably diminished by the mode of procedure here recommended.

8. As to the *time* and *mode* of imprisonment, it is observed that the *mittimus* must have an apt conclusion. No precise form for this precept has been established by statute provision ; yet it seems to be as worthy of legislative interference, as most of the precepts, the forms of which have been established by legislative authority. We must therefore resort to the rules of the common law as guides in this particular. The words used in the conclusion are, to detain the prisoner "until he shall be discharged by due course of law."* These words are said to be proper, only when the party is committed for an offence not bailable ; but when he is committed for want of sureties for a bailable offence, it is said to be usual to direct the gaoler to "keep the prisoner in his said custody, for want of sureties, or until he shall be discharged by due course of law." The *mittimus* may command the gaoler to keep the party "in safe custody ;" for if

* 2 Hale, 123 ; Hawk. b. 2, c. 16, s. 18.

every gaoler be bound by law to keep his prisoner in such custody, there can be no objection to reminding him of his duty in the *mittimus* ;* and if the conclusion be irregular, it will not vitiate the *mittimus* ; and therefore, if a commitment, "till further order," be made by a justice, yet a breach of prison, under such a warrant, would be an offence ; and if the party were removed by *habeas corpus*, yet if the cause and manner of his commitment be such as to require his detention in custody, or his finding sureties, he shall be bailed or committed accordingly and not discharged, because the informal conclusion will be rejected. Such a warrant would be a good justification in an action of false imprisonment against the gaoler, though the right conclusion be omitted, or the wrong conclusion inserted. It is a lawful warrant, notwithstanding the omission or incongruity of the conclusion, so as to make the voluntary permission of an escape, or the breach of prison, a punishable offence.†

No precise mode of introducing the statement of the offence appears to be material. Either of the following forms will answer, "charged with feloniously assaulting," &c. or "with having on," &c. or "charged with a misdemeanor, viz. with having," &c. or "for that he the said A. B. on," &c. ; and then recite the complaint, according to the decision in Ward's case.‡ The latter is decidedly the preferable form of introducing the statement of the crime, for which the party is to be committed. If the offence be against a statute, the description should close with the words, "contrary to the form of the statute in such case made and provided." This, indeed, will be only continuing the description of the offence in the complaint, if the complaint be properly drawn ; for the description, in all offences against penal statutes, must conclude, "contrary to the form of the statute, (or statutes), in such case made and provided."

The form of the *mittimus* states, at the beginning, the style and jurisdiction of the justice, and is directed to the constables of a town named in the *mittimus*, or to the sheriff or his deputy, and

* Hawk. b. 2, c. 16, s. 15 ; 1 Stra. 3.

† 1 Hale, 584.

‡ 4 Mass. Rep. 497.

to the keeper of the particular gaol to which the justice intends the prisoner shall be committed ; and commands the sheriffs and constable to convey the prisoner into the custody of the gaoler, and the gaoler to receive and keep him in the said gaol, until he shall be thence delivered by due course of law.

It is the duty of the gaoler to receive the party ; and if he refuse, or unlawfully demand any thing for receiving him, it is an indictable offence.* If the gaoler will not receive him, it is said the person who arrested him may, in such case, keep the prisoner in his own house.† The officer, to whose custody he was committed on the *mittimus*, may, in such case, keep the prisoner until the gaoler can be induced or compelled to receive him.

The expense of conveying the prisoner to gaol is to be defrayed by the government. This expense is sometimes made to exceed the bounds of reason or necessity, and when that is the case it will not be allowed by the court before whom the prisoner is to be tried. There are no stated fees for that part of the expense in the service of a *mittimus*, which usually constitutes the largest item, viz. the mode of conveyance and travelling, and the support of the prisoner on the way. These are regulated, as to the amount allowed, altogether by the discretion of the court. By the English statutes of 3 James I. and 27 Geo. II. the expenses of conveying the prisoner to gaol who is committed by a justice of the peace for any offence or misdemeanor, and also of his guard, shall be defrayed by the prisoner, if he have the means and ability to do it ; and if he refuse, the justice may issue his warrant to seize and sell a sufficient quantity of his goods, for this purpose. And when the prisoner has not money or goods in the county where he is taken sufficient to pay these expenses, the latter act directs that a justice may, by his warrant, order the treasurer of the county to pay the same. By the *habeas corpus* act, 31 Car. II. the charge of conveying an offender is limited so as not to exceed twelve pence per mile. A similar provision in this commonwealth would not only be extremely salutary, but

* Dalt. J. c. 170 ; 1 Chit. C. L. 117.

† Id.

be the means of preventing exorbitant demands, and no small degree of imposition upon the government, in the usual expenses of a criminal prosecution.

If the magistrate acting within the scope of his authority and jurisdiction, but taking an erroneous view of the effect of the evidence, should come to a wrong conclusion, and commit the defendant, and he should be afterwards discharged by the higher court on a *habeas corpus*, yet the magistrate would not, on that account, be liable to an action of damages.*

It is enacted by the *habeas corpus* act,† that every officer, to whose custody any prisoner shall be committed, shall, within six hours after demand made, deliver such prisoner a true copy of the warrant or process by which he stands committed, under a penalty which is provided in the sixth section of the act.

It will be recollected that the commitment, in all cases, must be for trial at the *next* term of the court for the county, in which the trial is to be had; and that all recognisances must also be taken for the *next* term of the court to which they are made returnable.

CHAPTER VII.

THE TAXATION OF COSTS, AND CERTIFYING AND RETURNING THE PROCESS INTO COURT.

It is a general maxim of the common law, that the government neither pays nor receives costs. In England, although a criminal prosecution is considered as at the suit of the king, and is instituted and prosecuted in his name, it is in fact carried on by the prosecutor, and no costs, at common law, were payable, whatever might be the event of the prosecution. But this discouragement to the prosecution of offenders has been

* 14 East, 82; 1 Chit. C. L. 95.

† Statute 1784, chap. 72, sec. 6.

in some degree removed by several statutes.* By one of these it is enacted, that it shall be in the power of the court, before whom any person had been tried and *convicted*, to order, at the prayer of the prosecutor, the treasurer of the county in which the offence was committed, to pay his reasonable expenses, and to make a further allowance for his time and trouble. And by a subsequent statute,† a similar allowance was to be made where the defendant was *acquitted*, after a *bonâ fide* prosecution for which there was a reasonable foundation. By the provisions of a more recent statute,‡ the fees of officers, in criminal prosecutions, have been materially altered, or done away; and provision is made to indemnify the officers, out of the county rate, in proportion to the amount they had been accustomed to receive.

As the government never pays costs, it follows that the defendant, though acquitted, must defend himself at his own expense; unless in capital trials, in all which it is the practice, in this state, for the court to assign counsel to the prisoner, (who are bound, as a professional duty, to defend him on his trial, without pecuniary compensation,) and to direct his witnesses to be summoned at the public expense, and paid out of the public treasury.

The statute of this commonwealth, establishing and regulating the fees of office, was originally passed February 13, 1796.§ It was a temporary act, and was to continue in force two years. By divers subsequent acts it has been revived, and continued in force to the present time.

A faithful adherence to the provisions of this statute, in the taxation of costs in criminal prosecutions, is a very important duty of a justice of the peace. It has been so differently construed, or carelessly executed, that little uniformity has been preserved in the practice of justices, in the different counties, and even in the same county. From these causes, the bills of cost, sent up to the Supreme Judicial Court, have varied in amount from twenty-five to a hundred per cent, for similar fees and services. Yet the fees of the several officers are stated in

* 4 Bla. Com. 361, 362; 1 Chit. C. L. 825.

† 18 Geo. III.

‡ 55 Geo. III.

§ Statute 1795, chap. 41.

the statute with very little ambiguity. There appears to be but one instance where a justice is permitted to use his discretion as to the amount of the fee or compensation to be taxed ; and that is, to the officer for summoning witnesses, whose fees, in some special cases, may be increased to what the court may judge reasonable. This discretion, upon a liberal construction of the statute, may be extended to justices, as well as other courts, although the former are not expressly mentioned. In all other cases, the fees allowed and accruing upon a criminal prosecution before a justice, appear to be plainly and explicitly stated in the statute.

It requires some degree of firmness in an acting magistrate, to restrict officers and witnesses, particularly the former, to their legal fees in the taxation of costs. They generally think themselves inadequately compensated by them ; and in some special instances and services, their complaints are just. When their bills are to be examined and allowed in the Supreme Judicial Court, there is a power in that tribunal, (which has always been liberally exercised,) to allow them an adequate compensation. But it is doubted whether justices of the peace can legally exercise such power, in cases confined to their own jurisdiction. When extra, exorbitant, or unlawful fees and expenses are charged and claimed by officers or witnesses, in cases to be sent up to the superior courts for trial, the justice, strictly speaking, cannot allow or disallow them. In these cases, the whole process, and every thing pertaining to it, are transferred from the justice to the higher courts, there to be finally examined and decided upon. But it is the duty of the justice to require those who claim the extra allowance, to state minutely and specifically the items of it ; which he is to insert in the bill of cost, that when it is copied and sent up, it may appear for what particular services or expenses the extra allowance is claimed. A more particular direction upon this subject will be given hereafter, when the several items of a bill of cost are considered. With respect to the justice's own fees, although, in practice, there has been a considerable difference in the sums charged by different justices for similar services, yet they are so plainly stated in the statute, which

we usually call the *fee bill*, that there seems to be no difficulty in correctly ascertaining them.

The fees to be taxed in a criminal process, before a justice of the peace, are, 1st, those of the justice ; 2d, those of the witnesses ; and 3d, those of the officer and his assistants.

1. The fees allowed to a justice are for receiving a complaint and issuing a warrant, *fifty cents*. The term "receiving a complaint," by practical construction, includes the duty of *drawing it up*. In ordinary cases, the party complaining applies to the justice, states the nature of his complaint, which the justice thereupon reduces to legal and technical form. Sometimes, when the crime to be prosecuted requires a long and very particular description, as perjury, conspiracy, &c. the complainant applies to counsel, has his complaint drawn up, and presents it to the justice ready written. There is no objection to this practice whenever the party thinks proper to adopt it ; and in the prosecution of offences which require a long and technical description, it is, on many accounts, convenient and useful. Justices of the peace, who have not had a professional education, are generally incompetent to this undertaking ; yet the constitution requires that no person shall be held to answer to an offence until the same is *formally* (that is, technically) as well as substantially described to him in the complaint or process upon which he is arrested.

But as the prosecution of crimes in this country is not only in the name, but purely by the authority and instrumentality of the government and its officers, and not, as in England, by the instrumentality of an individual prosecutor, whoever originates a public prosecution has a right to have the accusation drawn up and proceeded upon, free of expense to him, either by the magistrate or public prosecutor. And therefore this duty of *drawing up* the complaint, as well as receiving it, in all criminal prosecutions which are originated before a magistrate, devolves upon him ; and thence arises the necessity of his being well versed in this branch of his duty. It may not be improper to repeat in this place, that the common practice, in this state, of making the warrant and complaint upon the same sheet of paper, and send-

ing the latter out of the hands and power of the magistrate into the hands of the officer, to be carried wherever he is obliged to go to execute his warrant, to be examined, exposed, lost, or destroyed, instead of remaining in the office, and on the files of the justice, is liable to serious objections.

The next item, in the bill of cost to be taxed for the justice, is for entering the complaint, rendering judgment and recording the same, examining, allowing, and taxing the costs, and filing the papers, *seventy-five cents*. The duty for which this sum is allowed, as it is expressed in the fee bill, comprehends the whole proceedings on the examination and trial, from the arraignment of the defendant, to the rendering of judgment and taxation of costs. This is generally a very inconsiderable allowance for the service required ; and in some instances, it is wholly inadequate. In many cases the examination necessarily occupies a whole day ; the party is often necessarily detained, either by commitment or recognisance, for further examination, and then, several hearings upon different days may be required. There is no existing *statute provision* to remedy this inconvenience. But it has been remedied in certain cases, by the general discretionary power vested in the Supreme Judicial Court, which is always exercised in favor of magistrates whose services, in the cases alluded to, cannot be compensated by a strict limitation to their established fees. This liberality has been generally confined to examinations in capital cases ; but it has also, in some few special and extraordinary instances, been extended to others. The examination of prisoners, charged with homicide and other capital offences, (especially in the country,) is usually and necessarily attended with great labor, anxiety, and responsibility, on the part of the magistrate. It is evident that the established fees, in these cases, are wholly inadequate to the services rendered to the government ; and, therefore, it has been usual for the magistrate, or magistrates, (if more than one are called to attend the examination,) to make out an account against the Commonwealth, in which is charged their actual expenses, including a reasonable allowance for their time. Such accounts, containing reasonable charges of this nature, have been allowed. In some few instan-

ces, similar allowances have been granted, in the Supreme Court of this state, for extra services in the examination of cases not capital ; such as arise in the detection and prosecution of bands or companies of counterfeiters of bank notes ; high handed and dangerous riots, &c. Allowances of this description, however, are rarely made, and are not to be expected by magistrates, unless in cases attended with extraordinary difficulty and labor.

The next item of fees, allowed to the justice, is, for recognising persons charged with crimes, for their appearance at court, and for certifying and returning the same, with or without sureties, *twenty-five cents*, to be paid by the person so recognising. As this fee is to be paid by the party who enters into the recognisance, it cannot be charged to the government, and consequently must not be put into the bill of cost. The reason for requiring *the party* to pay this fee, probably is, that he is bound to provide and tender his sureties, and to do all other things that may be necessary to entitle him to be discharged upon his producing sufficient bail. The service required for this fee *may be* out of all proportion to its amount. One part of this service is to certify and *return* the recognisance to court. When the justice lives in the town where the court is holden, the duty of returning the recognisance is attended with little trouble ; but a justice, who resides at a distance from the shire town, must either travel thither himself to return the recognisance, or intrust it to the care and conveyance of others ; and if, in either case, it is not delivered into court, or returned to the clerk's office on the morning of the first day of the term, he is liable to a fine for the neglect.* In such cases the established fee is wholly inadequate to the service required.

The fact is, that when the act establishing the fees of office was made, justices of the peace constituted the Court of General Sessions of the Peace in the county. It was then not only their duty to attend that court, but they were paid for their travel and attendance. The recognisances, therefore, taken for *that court*, were delivered in by the justices in the due course of their official duty, and without extra trouble. But since the abolition

* Ex parte Neal, 14 M. R. 205.

of the Court of Sessions, the justices have not this privilege in the return of their recognisances. And therefore the fee at present allowed for that service ought to be enhanced.

The last item in the bill of cost to be taxed for the justice, is a *mittimus* on a criminal accusation, *twenty-five cents*. In another part of the fee bill, under the head of "Justices' fees," there is an allowance of *ten cents* for every subpoena. As this is put down among the fees of a justice in *civil cases*, it was probably intended by the framers of the fee bill, to be restricted to a civil process. By the second section of the act, vesting certain powers in justices of the peace in criminal cases,* they are expressly authorized to grant *subpœnas* for witnesses in criminal cases pending before any of the courts, and before themselves; but no fee for such *subpœnas* is established by that act; nor is such fee otherwise established in the fee bill, than is before stated. As it is reasonable, and not inconsistent with the act, that this fee should be taxed in criminal cases, it has been the practice to allow it.

There are no other fees mentioned or contemplated in the act establishing and regulating the fees of officers, to be allowed a justice of the peace in a criminal prosecution, than those already stated. There are, however, some other duties and services necessary in such prosecutions, for which no established fee is ordained, but which have been usually charged and allowed. The first of these is the duty of recognising the witnesses on the part of the Commonwealth, and enjoining upon them a punctual attendance upon the court. The practice of recognising the witnesses to testify on behalf of the Commonwealth, is not regulated by any statute. It is sanctioned by constant usage, grounded, (it is presumed,) upon the two statutes of 1 & 2, and 2 & 3 of Phil. & Mary, by which express authority is given to a justice to bind over witnesses to appear and give evidence against a party indicted. For the taking of the recognisance of witnesses, the same fee has been allowed, as is established for taking the recognisance of the party. Whenever this duty is neglected, the consequences are extremely embarrassing, and occasion great and unnecessary expense in summoning the witnesses, and in the consequent de-

* Statute 1783, chap. 51.

lay of the business of the grand jury ; all which may be prevented without inconvenience to the magistrate, by doing his duty in this particular. When the witnesses are all present, one recognisance for the whole of them is sufficient, and is all that will be allowed the justice in the taxation of his costs. To this rule, however, there doubtless may be exceptions ; as where the recognisances of the witnesses are necessarily taken at different times.

The other duty of the justice in these prosecutions, for which no established fee is provided, is that of making out, certifying, and sending up with the recognisance, a copy of the process. The fee which, in ordinary cases, the court have allowed for these copies, has been *one dollar*. But in particular cases a larger and more adequate allowance will be made, in proportion to the length of the documents copied. The statutes of Phil. & Mary, before mentioned, enact, that the justices who bail or commit for the offences therein specified, shall certify the examinations as well as the recognisances, at the next court of general gaol delivery to be holden within the limits of their jurisdiction. Our practice of returning copies of the process, as well as of the recognisance, is probably founded upon these statutes ; for we have no statute provision upon the subject. It does not appear by any statute, that any part of the process is required to be returned or sent up, except the recognisance of the party ; and this is not required by any positive enactment, but only by implication suggested in that part of the fee bill, which allows a fee for certifying and *returning* it. The necessity of depositing it in the court to which it is returnable, is, indeed, dictated by the nature of the instrument ; for the recovery of the penalty cannot otherwise be enforced. It is remarkable that no statute provision is made or contemplated, sanctioning and regulating the practice of taking and certifying the recognisances of witnesses in criminal cases ; and that no form of a *scire facias*, either upon the forfeiture of such recognisances, or of the recognisances of the party and his sureties, is established in the act of prescribing the form of writs in civil cases.* All our practice, upon these im-

* Statute 1784, chap. 28.

the bill of cost is certified to the county treasurer, accompanied with an order of court to pay the amount, the name of every person who is to receive any part of it must appear upon the bill, to enable the treasurer to settle and pay it ; the mode of doing which is, for each person whose name is in the bill, to receipt upon the back of it, when his fees are received. And it is not sufficiently correct to carry out the amount of a witness's fees, without stating the number of miles he has travelled, and of the days he has attended.* And when witnesses are summoned to testify on several prosecutions, pending at the same court, the rule is to allow them their travel in one case, and their attendance in all the others.

3. The fees of sheriffs and constables, on a criminal process returnable before a justice of the peace, require a particular explanation. With respect to such of them as are specially stated in the fee bill, there can exist no difficulty or uncertainty as to their amount,—but with respect to such as may be increased or diminished at the discretion of the court, the adjustment of them is frequently attended with no small degree of trouble and difficulty.

The first item is for the service of the warrant, *thirty cents*. The second is for aid in criminal cases. The sums stated in the fee bill are, to each person employed as aid, for every twelve hours' attendance, including expenses, *one dollar*, and so in proportion for a greater or less time ; and *four cents* for each mile's travel, going out and returning home.

Impositions, sometimes practised by officers in their charges for the services of aids, may be prevented by proper caution in the magistrate. The fees and charges in the officer's return of the warrant ought to be particularly inspected and corrected, at the time when it was made. And the justice ought to require, that the names of the persons employed as aid, together with the precise number of hours that each of them were employed, together with the amount of travel of each person thus employed, should be specially stated in the officer's return. No bill of cost

* See post, the form of the bill of cost.

can be correctly taxed, or ought to be allowed, without such specification. The practice of some officers is to charge a round sum for aid, without naming the persons, or specifying the time or distance of their attendance and travel. Charges thus loosely made, are constantly rejected in the final taxation of the costs in the Supreme Court. The consequence is, that the officer is not only delayed in the receipt of his legal fees, but is obliged to make a special application to the court for their allowance; and thus the trouble of taxing the bill, and finishing the proceedings in the process, are greatly and unreasonably increased. But if the directions above given are complied with, *viz.* for the justice to require the officer to state in his return the names of the persons employed as aid, the number of hours they were employed, and the number of miles they have travelled, it can be seen at once whether the fees, for the service of the warrant, are legally and correctly charged. And it is the duty of the justice in all cases where the officer refuses or neglects to comply with these directions, to refuse to certify the copy of the return.

The next item allowed to officers is, for summoning witnesses in criminal cases, *ten cents* for each witness, and his travel, which is to be the same as on the service of a warrant, which will be presently noticed in considering that item. This fee, for the officer's travel on the service of a summons for witnesses, may, by a provision in the fee bill, be increased, in special cases, to what the court may judge reasonable. This is a very proper and necessary provision; for it often happens that the attendance of a witness may be unexpectedly required under circumstances which render a *special service* of the summons indispensable.

The practice of converting the warrant into a summons, that is, the naming of the witnesses at the close of the warrant, and commanding the officer to summon them, making that a part of his duty in the execution of the warrant, has, by some judicious magistrates, been thought to be liable to objections. The inconvenience (if any) of this practice must depend upon the circumstances of each particular case. When the arrest and safe keeping of the prisoner can be accomplished, and the witnesses summoned at the same time, without danger of an escape, and with-

not even the guilty, should suffer hunger or thirst in a christian land ; it rather adopts and follows the divine and heavenly spirit, which enables the prisoner to say, " I was an hungered, and ye gave me meat ; I was thirsty, and ye gave me drink ; I was sick and in prison, and ye came unto me." There have been cases where the officers have undertaken to supply their prisoners with spirituous liquor, and to charge it as a part of the expenses of executing the warrant. Such a charge cannot be allowed under any circumstances, unless the liquor was necessary and used as a medicine. *Extra services*, as they are denominated, without any specification of their nature, or of the necessity of performing them, will always be rejected, when charged in that manner in the execution of any precept.

The practice of some officers, of charging fees several times over, for what is in fact but one service, is not legal, and requires notice and correction in the magistrate ; as when an officer has several warrants or other precepts against the same individual. Instances have occurred, where the fees of persons employed as aid have been charged upon as many warrants as the officer may have had committed to him, against the same person, though upon but one and the same arrest. Although the prisoner may be considered to be in his custody on each of the warrants, yet the services of the aid in guarding the same individual, when charged, or pretended to be performed several times over, are altogether fictitious ; and no reason can be assigned for allowing them. The practice in the Supreme Court has been, to allow, in all these cases, for such services as have been *actually performed*, and no more.

When the examination is concluded, and the justice decides that the party shall be committed, or bound over to answer to the offence, the last act he has to perform is that of certifying and returning the recognisances and other parts of the process, into court. We have heretofore seen* the reasons why he should commit or bind over the party to the Court of Common Pleas, and not to the Supreme Court, in certain cases, within the juris-

* Ante, p. 95.

diction of the former court. Those parts of the process, which it is expedient or necessary that the justice should copy and send up, have also been stated.*

This part of the duty of the justice is so connected with the administration of justice in the courts of superior jurisdiction, as to be of great importance in the economy and despatch of business in those courts. A want of accuracy or punctuality in the discharge of this duty, produces great embarrassment, delay, and expense, in the courts before which the accused party is to be tried. If the justice neglect to recognise the witnesses on the part of the Commonwealth, or to impress upon their minds the necessity and duty of an early and punctual attendance upon the court; or if he neglect to certify and return his copies of the process in due season, the court, the grand jury, the public prosecutor, and all others connected with the prosecution, are greatly embarrassed and delayed. If magistrates would seriously reflect upon the evils which are the consequence of such negligence, they would doubtless be in a great measure prevented. They should consider that the grand jury (seldom consisting of a less number than twenty-three) may be prevented from proceeding on their business, if the documents necessary for their examination are withheld, or the punctual attendance of the witnesses prevented by their negligence or misinformation. The loss of a day is frequently the consequence of this negligence. An industrious and respectable portion of the community are subjected, most unreasonably, to the inconvenience and vexation it occasions. The expense to the county, and the waste of precious time, increase this catalogue of evils, which, to those who are in the habit of punctuality themselves, are grounds of just and loud complaint.

Some apology may be allowed to those justices who reside at a distance from the places where the courts are holden; for there is no fee or allowance established by law, for their travel and other expenses in attending the court to deliver in the papers of which they are required to make return. There ought to be

* Ante, p. 124.

provision made by law to this effect ; and also to punish, by proper penalties, all neglects of this kind. Justices are, indeed, now punishable for them, as contempts of court ; instances of which are well recollected in the Supreme Judicial Court of Massachusetts.* It seems, however, unreasonable, that they should be thus punishable for the neglect of a duty, for the performance of which the law allows them no compensation. The consequences frequently have been, that they intrust the return of their papers to a careless friend or attorney, by whose negligence or inattention the mischief is often occasioned.

Having stated the reasons why a justice should commit or bind over the party for trial to the Court of Common Pleas, in preference to the Supreme Judicial Court, in all cases excepting such as are exclusively cognizable in the latter court, it may not be amiss to state also what offences may properly be referred for trial to the Court of Common Pleas. They are, all assaults and batteries not committed with a felonious intent. But if committed with intent to murder, rob, or to commit a rape, they are called *felonius assaults*, and cannot be punished in the courts of inferior jurisdiction. And when an assault and battery has been committed with such violence, or with such weapons, as to endanger the life of the party, the offender ought to be sent for trial and punishment to the Supreme Judicial Court.

Riots also are cognizable in the Courts of Common Pleas ; and unless committed under circumstances greatly aggravated, the offenders ought to be sent to that jurisdiction for trial and punishment, by the magistrate before whom the process is originated. But when committed in a high-handed manner, under circumstances particularly atrocious or terrifying ; as when committed in open opposition to public authority, they ought to be examined, tried, and punished in the highest judicial courts.

Simple larcenies, where the property stolen does not exceed in value or amount the sum of *one hundred dollars*, are also cognizable in the Courts of Common Pleas, and it is the duty of a magistrate, in all such cases, to send the party there to be tri-

* Ex parte Neal, 14 M. R. 205.

ed. But if the larceny be committed in any building which is mentioned in the statute for the punishment of larcenies* and robberies, or if the larceny be from the person of another, it cannot be tried in the Court of Common Pleas. There are numerous other offences which are cognizable in the Courts of Common Pleas, the prosecutions for which are not usually brought before a justice in the first instance, but which are commonly prosecuted by complaint to the grand jury. With respect to these, and all others cognizable in that court, when the complaint is brought before the grand jury of the Supreme Judicial Court, it is the practice to turn the complainants over to the grand jury of the Courts of Common Pleas, unless the offender has been committed or is under recognisance for trial before the Supreme Court; in which cases the complaint ought to be there examined and finally decided upon.

With respect to one class of inferior offences, *viz.* all offences against the statute "providing for the due observation of the Lord's day,"† it has been decided that all such offences are *originally* and exclusively cognizable before the Courts of Common Pleas, and justices of the peace, in the manner expressly provided in the thirteenth section of that statute; and that the Supreme Judicial Court have no *original* jurisdiction of any of those offences.‡ This was the unanimous opinion of the court in *Johnson's case*. See the opinion of Sedgwick J. in that case, very fully stated.

It is hardly necessary to remark, that persons charged with all other offences, whether capital or not capital, of the higher and more atrocious character, must be committed or bound over for trial, to the Supreme Judicial Court; and that they cannot be proceeded upon in any of the courts of inferior jurisdiction. This distinction, between the crimes of which the lower courts have a jurisdiction concurrent with the Supreme Judicial Courts, and those which are exclusively cognizable in the latter court, ought to be clearly understood, and carefully attended to, by acting magistrates; for it has frequently happened that they have, by

* Statute 1804, chap. 143.

† Statute 1791, chap. 58.

‡ 8 M. R. 87, *Commonwealth v. Johnson*.

mistake, committed or bound over persons for trial to the Courts of Common Pleas, for crimes which are not cognizable in that court. The consequence has been, that the time and expense incurred by the process, have been in great measure lost; for no order or proceeding in such case can be had in the Common Pleas, except to order the party to be remanded, or to find sureties for his appearance at the next Supreme Court to answer to the accusation.

When all the proceedings upon the process are completed, there is no remaining duty for the justice to perform, but to return his papers into the court in which the party is to take his trial. Great care and punctuality are necessary on the part of the magistrate, in the discharge of this duty; and great embarrassment and vexation are the certain consequence of his neglect of it. He will have discharged this duty correctly *only* when he has done one of two things, *viz.* either deposited his record and papers in the clerk's office of the court, on or before the morning of the day on which the court is to be opened; or by delivering them into the hands of the public prosecutor, on some day previous to the sitting of the court, or on the morning of the day on which it is opened, and before the grand jury are empannelled. Whenever the justice neglects to do one or the other of these things, he is in danger of the censure of the court, and, as we have seen,* of being fined for a contempt. The practice has been for justices who live at a distance from the shire town, to send their papers by some friend or attorney who has business at court. Whenever a magistrate takes the risk of doing this, he will find it for his interest to give his messenger a very particular charge as to the consequences of a neglect to deliver them in such season as is herein stated to be necessary. Attornies and others, to whom these papers are intrusted, frequently have no occasion to attend the court on account of their own business, until the afternoon of the first day of the term. And then it is natural for them to think of their own business first, and afterwards, that of their friends. Instances have occurred when the

* Ante, p. 108, 132.

person intrusted with the return of a justice's process, has wholly forgotten that he was the bearer of it. The grand jury and all others connected with the prosecution, are not only hereby delayed, but undergoing the severest trial of their patience. A day in the most busy season of the year is wasted ; the expenses of the prosecution enhanced, probably doubled ; and the magistrate mortified and rendered liable to punishment for *negligence* ! It was the remark of a late venerable judge in Massachusetts,* that " punctuality was a great *republican* virtue." It is certainly a virtue of great and indispensable importance in all *judicial* proceedings.

The want of punctuality in those magistrates who have papers to be returned for the use of the judicial courts, frequently arises from a very erroneous impression, that no business is usually done on the first day. This *has been* in years that are past, in some degree, the case ; but it is so far from being true now, that when there is a punctual attendance of the juries, witnesses, parties, and others, the business of the court usually commences, and causes are tried in the morning of the first day of the session ; and several instances have lately occurred, where, in capital cases, the witnesses have been examined, the bill found by the grand jury, the prisoner arraigned, and the day assigned for his trial before the adjournment of the court *on the morning of the first day* on which it convened. It is manifest, that there must be a great saving of time and expense, by this punctuality and despatch ; but it depends much upon the attention and vigilance of magistrates who undertake the examination of public prosecutions, whether the benefits of them are generally realized.

Whenever, therefore, a magistrate has taken the examination of a person accused of an offence, the record and process of which it is his duty to return to court, *he ought either to deposit it, with his own hand, in the clerk's office of the court to which it is made returnable, on or before the opening of the court on the morning of the first day of the term ; or he ought to deliver it,*

* The late Judge Paine.

with his own hand, to the attorney general, or other public prosecutor attending the court, before the grand jury are empannelled. But if such magistrate will take the risk of sending up his record and process by some other person, when he delivers him the papers he ought to say to him, "These papers must be deposited in the clerk's office of the court on the morning of the first day of the session; or they must be delivered into the hands of the attorney general, or other public prosecutor, before the grand jury shall be empannelled. If you fail to do it, I shall be liable to punishment for the neglect, and great embarrassment, delay, and public injury, may also be the consequence of your inattention."

PART II.

THE following are the forms of the several parts of a criminal process before a justice of the peace, from the beginning to the conclusion of the proceedings. A case of larceny is selected, as being an offence which most frequently occurs. Many other forms are added, taken from the English authorities.

Form of the Complaint.

To A. B. Esquire, one of the Justices of the Peace within and for the county of Suffolk.

C. D. of Boston, in the said county of Suffolk, blacksmith, upon his oath complains, that on the tenth day of June in the year of our Lord one thousand eight hundred and twenty-three, at Boston aforesaid, in the county aforesaid, the following goods, viz. one silver watch, of the value of twenty dollars, of the goods and chattels of the said C. D., then and there in the possession of the said C. D. being found, was feloniously taken, stolen, and carried away, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided; and the said C. D. has probably cause to suspect and doth suspect,* that E. F. of said Boston, laborer, did feloniously steal, take, and carry away the goods and chattels aforesaid. He therefore prays that the said E. F. may be apprehended and held to answer to said complaint, and dealt with relative to the same as law and justice may require. Dated at Boston afore-

* Where the fact of stealing by the deft. is within the actual knowledge of the complainant; the allegation in the complaint ought to be positively asserted, and not upon suspicion.

said, this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three. C. D.

Suffolk ss. July 10th, 1823. The said C. D. made oath to the truth of the foregoing complaint.

Before me, A. B., *Justice of the Peace.*

*Form of the Warrant upon the above Complaint.**

Commonwealth of Massachusetts.

Suffolk ss. To the Sheriff of the said county of Suffolk, or his Deputies, or (L. S.) any of the Constables of the city of Boston. Greeting.

These are in the name of the Commonwealth of Massachusetts, to command you, and each of you, upon sight hereof, to take and bring before me the subscriber, one of the justices of the peace for the said county of Suffolk, or some other justice of the peace within and for the said county, the body of E. F. of Boston, in the said county of Suffolk, laborer, if he may be found in your precinct, to answer to the said Commonwealth on the complaint of C. D. of said Boston, blacksmith, this day made on oath before me the subscriber, that on the tenth day of June now last past, at Boston aforesaid, one silver watch of the value of twenty dollars, of the goods and chattels† of him the said C. D. and in his possession then and there being found, were feloniously stolen, taken, and carried away, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided; and that he has probable cause to suspect and doth suspect, that the said E. F. did feloniously steal, take, and carry away the goods and chattels aforesaid. Hereof fail not at your peril. Given under my hand and seal at said Boston, this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Form of the Record and Order to recognise.

Suffolk ss. At a Justice's Court, holden before me the subscriber, one of the justices of the peace within and for the said county of Suffolk, on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three. *Be it remembered,* that E. F. of Boston, in the said county of Suffolk,

* See ante, p. 26, for the reasons against drawing the complaint upon the same sheet with the warrant.

† Where gold or silver coin are among the articles stolen, the words "and monies" should follow the words "goods and chattels."

laborer, is brought before me by virtue of a warrant, duly issued upon the complaint of C. D. &c. wherein the said C. D. complains [*here insert the complaint*], which complaint being read and heard by the said E. F., he the said E. F. is asked by me the said justice, whether he is guilty or not guilty of the offence charged upon him in manner and form aforesaid, who pleadeth and saith, that he is not guilty; but after hearing divers credible witnesses, duly sworn to testify the whole truth relating to the premises, and it thereupon appearing to me that there is probable ground to believe that the said E. F. is guilty of the offence charged upon him in the aforesaid complaint, it is therefore considered and ordered by me the said justice, that the said E. F. recognise to the Commonwealth in the sum of one hundred dollars, with sufficient surety or sureties in the like sum, for the personal appearance of the said E. F. before the next Supreme Judicial Court to be holden at Boston within and for the county of Suffolk [*or to the Court of Common Pleas, or Municipal Court of the city of Boston, as the justice shall order*], on the first Tuesday of November next, then and there to answer to such matters and things as shall be objected against him the said E. F. on behalf of said Commonwealth, but more especially to the aforesaid complaint of the said C. D., and to do and receive that which shall then and there be enjoined upon the said E. F. by the court aforesaid.

A. B., *Justice of the Peace.*

Form of the Recognisance of the Party, in pursuance of the foregoing Order.

Commonwealth of Massachusetts.

Suffolk ss. Memorandum, that on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three, personally appeared before me, A. B. Esquire, one of the justices of the peace within and for the said county of Suffolk, E. F. of Boston aforesaid, laborer, and G. H. and I. J., both of said Boston, cordwaners, and acknowledged themselves to be severally indebted unto the Commonwealth of Massachusetts in the respective sums following, to wit, the said E. F. as principal, in the sum of one hundred dollars, and the said G. H. and I. J. as his sureties, in the sum of fifty dollars each, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said Commonwealth, if default be made in the performance of the condition following.

The condition of this recognisance is such, that if the said E. F. shall personally appear before the justices of the Supreme Judicial Court, next to be holden at Boston within and for the said county of Suffolk [*or such other court as the justice shall order*], on the first Tuesday of November next, then and there to answer to such matters and things as shall be objected against him on behalf of said Commonwealth, but more especially to the complaint of one C. D., made on oath before me the said justice on this tenth day of July instant, for feloniously stealing, taking, and carrying away one silver watch, of the value of twenty dollars, of the goods and chattels of him the said C. D., and shall do and receive that which by said court shall be then and there enjoined upon him the said E. F., and not depart without license, then this recognisance to be void ; otherwise to remain in full force, power, and virtue.

A. B., *Justice of the Peace.*

Form of Recognisance of Witnesses.

Suffolk ss. Memorandum, that on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three, A. B., C. D., and E. F., all of Boston in the said county of Suffolk, laborers, personally appeared before me the subscriber, one of the justices of the peace, within and for the said county of Suffolk, and acknowledged themselves to be severally indebted to the Commonwealth of Massachusetts in the sum of fifty dollars,* to be levied on their goods or chattels, lands or tenements, and in default thereof upon their bodies, to the use of the Commonwealth, if default be made in the performance of the condition following.

The condition of this recognisance is such, that if the said A. B., C. D., & E. F. shall personally appear before the justices of the Supreme Judicial Court, next to be holden at Boston, within and for the said county of Suffolk, on the first Tuesday of November next, then and there to give evidence on behalf of the said Commonwealth upon the complaint of one C. D., made upon oath before me the said justice, against one E. F., in which complaint the said C. D. charges the said E. F. with feloniously stealing, taking, and carrying away, one silver watch, of the value of twenty dollars, of the goods and chattels of him the said C. D. and shall not depart without license, then the above written recognisance to be void ; otherwise to remain in full force, power, and virtue.

A. B., *Justice of the Peace.*

* This is the sum in which witnesses are usually required to recognise in Massachusetts.

The Mittimus, when Bail is not offered.

Commonwealth of Massachusetts.

Suffolk, ss. To the Sheriff of our county of Suffolk, his Deputies, the Constables of our city of Boston, and the Keeper of the Gaol in our said county. Greeting.

These are in the name of the Commonwealth of Massachusetts, to command you the said sheriff, deputies, constables, and each of you, forthwith to convey and deliver into the custody of the keeper of our said gaol the body of E. F. of our city of Boston, in our county of Suffolk, laborer, brought before me the subscriber, one of the justices of the peace within and for said county of Suffolk, on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three, on the complaint of C. D. of said Boston, for that on the tenth day of June in the year of our Lord one thousand eight hundred and twenty-three, at Boston aforesaid, one silver watch of the value of twenty dollars, was feloniously stolen, taken, and carried away from him the said C. D. against the peace of said Commonwealth, and the form of the statute in such case made and provided; and that he had probable cause to suspect and did suspect, that the said E. F. did feloniously steal, take and carry away the same; and after due examination, the said E. F. was ordered by me the said justice to recognise with sufficient sureties in the sum of one hundred dollars for his personal appearance before the Supreme Judicial Court, next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of November next, with which said order the said E. F. refuses to comply. And you, the said keeper, in the name of the Commonwealth aforesaid, are hereby commanded to receive the said E. F. into your custody in our said gaol, and him there safely to keep until he shall comply with the said order, or be otherwise discharged in due course of law. Hereof fail not at your peril. Given under my hand and seal at said Boston, this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

The Bill of Cost.

Suffolk ss. At a justice's court holden before me the subscriber, one of the justices of the peace within and for said county of Suffolk, on the tenth day of July, in the year of our Lore one thousand eight hundred and twenty-three,

C. D. Complainant,	}	Costs,
v. E. F. for larceny, &c.		
Receiving complaint and issuing warrant	\$	
Swearing complainant	-	-
Summons for witnesses	-	-
Entering complaint, judgment, recording, examination, &c.	-	-
Trial	-	-
Witnesses, to wit,	-	-
A. B. miles	days	-
C. D. do.	do.	-
E. F. do.	do.	-
Mittimus	-	-
Recognisances of witnesses	-	-
Officer's fees for service of warrant, &c.	-	-

[to be particularly specified.]

Examined and allowed.

A. B., *Justice of the Peace.*

*Form of a Summons for Witnesses.**

Suffolk ss. To the Sheriff of our county of Suffolk, his Deputies, and the Constables of the city of Boston, in the county aforesaid. Greeting.

In the name of the Commonwealth of Massachusetts, you and each of you are commanded to summon A. B., C. D., and E. F., all of Boston aforesaid, to appear forthwith before me the subscriber, one of the justices of the peace within and for the said

* The following provision in Massachusetts, by statute 1791, chap. 53, sec. 6, should be particularly attended to:—"Be it further enacted, that no justice of the peace shall hereafter have power to issue summonses for witnesses to appear at any court, or before any justice of the peace, except on complaint brought before himself, to give evidence on behalf of the Commonwealth upon any criminal suit, unless it be by the request of the attorney general or person acting as state's attorney in the county where such justice dwells, and no witness, summoned without such request, shall be allowed any pay for his travel and attendance; and when any justice of the peace shall issue any summons, at the request of the party prosecuted, it shall be so expressed in the summons, and the witness shall therein be required to appear and give evidence, upon condition such person prosecuted pays him his legal fees, but not otherwise."

When a justice issues a summons for witnesses, at the request of the party accused, the abovementioned condition should be inserted, and in the very words of the statute, at the close of the summons, and immediately preceding he words "Hereof fail not," &c.

county of Suffolk, at my dwellinghouse [*or such other place as the justice shall appoint to hold his court*] in said Boston, to give evidence on behalf of said Commonwealth of what they know relative to a complaint this day made on oath before me the said justice, by C. D. of &c. against and E. F. for feloniously stealing, taking, and carrying away, one silver watch, of the goods and chattels of him the said C. D. Hereof fail not, and make return of this writ, with your doings thereon. Given under my hand and seal at said Boston, this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

The preceding forms are to be used in cases not within the jurisdiction of the justice, and where it is his duty to examine into the evidence of the party accused, and to commit or hold him to bail. The following forms are applicable to all cases within the jurisdiction of a justice to try and decide upon.

Form of a Record of Conviction before a Justice, of a Larceny within his jurisdiction to try and punish.

Suffolk ss. At a justice's court, held before me the subscriber, one of the justices of the peace within and for said county of Suffolk, on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three. *Be it remembered*, that E. F. of said Boston, blacksmith, is this day brought before me by virtue of a warrant, duly issued upon the complaint of C. D. of said Boston, cordwainer, wherein the said C. D. complains, [*here set out the complaint,*] which complaint being read and heard by the said E. F., he is asked by me the said justice, whether he is guilty or not guilty of the offence charged upon him in the said complaint, who thereupon pleadeth and saith, that he is not guilty; but after hearing divers credible witnesses, duly sworn to testify the whole truth relating to the premises, and fully hearing and understanding the defence of the said E. F. it appears to me the said justice, that the said E. F., is guilty of the offence aforesaid; it is therefore considered by me the said justice, that the said E. F., for the offence aforesaid, forfeit and pay the sum of dollars to and for the use of this Commonwealth, and costs of this prosecution, taxed at dollars and cents, and that he stand committed until this sentence be performed.

A. B., *Justice of the Peace.*

Where there is an appeal claimed, the entry of it is as follows.

From which sentence the said E. F. appeals to the Court of Common Pleas, next to be holden at within and for the county aforesaid, on the Tuesday of next, and recognises with sufficient sureties to prosecute said appeal with effect.

A. B., *Justice of the Peace.*

Form of a Recognisance to prosecute an Appeal.

[The penal part of the recognisance is the same as in all other recognisances, till you come to the condition, which is in the following form.]

The condition of this recognisance is such, that whereas the said E. F. is brought before me the said justice, by virtue of a warrant duly issued on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three, to answer to the Commonwealth aforesaid, on the complaint of C. D. of said Boston, cordwainer, made on oath, wherein the said C. D. complained against the said E. F. that [*here insert the body of the complaint*], of which offence the said E. F. has been duly convicted before me the said justice, and has this day been sentenced by me the said justice, to forfeit and pay therefor, to and for the use of the said Commonwealth, the sum of dollars, and costs of prosecution, taxed at dollars and cents; from which said judgment and sentence the said E. F. appeals to the Court of Common Pleas next to be holden at within and for the said county of on the Tuesday of next. Now if the said E. F. shall and do prosecute his said appeal, and produce the copy of the whole process, and all writings filed before said justice, at said Court of Common Pleas, at the time aforesaid, and shall do and receive that which by said Court of Common Pleas, shall be then and there enjoined upon him, and not depart without license, then this recognisance to be void, otherwise to remain in full force, power, and virtue.

A. B., *Justice of the Peace.*

Mittimus for not paying Fine and Costs.

Commonwealth of Massachusetts.

Suffolk ss. To the Sheriff of the county of Suffolk, his Deputies, the Constables of the city of Boston, and to the Keeper of the Gaol in said county. Greeting.

Whereas E. F. of &c. blacksmith, now stands convicted before me the subscriber, one of the justices of the peace in

and for the county of Suffolk, of feloniously stealing, taking, and carrying away, [*here insert the body of the complaint,*] for which offence, he the said E. F. is sentenced by me the said justice to pay a fine to the use of the said commonwealth of dollars and costs of prosecution, taxed at dollars and cents, and to stand committed until this sentence be performed; all which sentence he the said E. F., now before me the said justice, refuses to comply with and perform.

These are therefore in the name of the Commonwealth of Massachusetts, to command you the said sheriff, deputies, and constables, and each of you, forthwith to convey the said E. F. to the common gaol in in the county aforesaid, and to deliver him to the keeper thereof, together with this precept. And you the said keeper are hereby in like manner commanded, in the name of the said Commonwealth, to receive the said E. F. into your custody into said gaol, and him there safely to keep, until he shall comply with said sentence, or be otherwise discharged by due course of law. Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the peace.*

[Where the sentence is *imprisonment*, the form of the *mittimus* is the same as the next preceding precedent, excepting that it must recite the sentence of imprisonment, and conclude as follows.]

For which offence, the said E. F. is sentenced by me the said justice, to be punished by imprisonment in the common gaol situated in Boston in the county aforesaid, from and after this tenth day of July in the year aforesaid, for and during the term of days. And you, the keeper of said gaol, are hereby commanded, in the name of the Commonwealth aforesaid, to receive the said E. F. into your custody into said gaol, and him there safely to keep until the expiration of said days, or he be otherwise discharged by due course of law. Hereof fail not. Given under my hand and seal, this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Mittimus for not finding Sureties of the peace.

Commonwealth of Massachusetts.

Suffolk, ss. To the Sheriff of our County of Suffolk, his Deputies, the Constables (L. S.) of our city of Boston, and the Keeper of the Gaol in our said county. Greeting.

Whereas E. F. of the city of Boston, in the county of Suffolk, blacksmith, by virtue of a warrant duly issued upon the complaint on oath of C. D. of said Boston, cordwainer, hath this day been brought before me the subscriber, one of the justices of the peace within and for said county, and after a hearing in the premises, has been by me the said justice ordered to find sufficient sureties to be bound with him in a recognisance for his personal appearance at the municipal court of the city of Boston, next to be holden at said Boston within and for the county of Suffolk, on the first Monday of next, to answer to such matters and things as shall then and there be objected against him; and in the mean time to keep the peace and be of good behavior to all the liege subjects of said commonwealth, and especially towards the said C. D. And whereas he the said E. F. hath refused and doth now, before me the said justice refuse to recognise himself as aforesaid, and to find such sureties, to wit, the said E. F. as principal in the sum of dollars, with sufficient sureties in another sum of dollars as now required by me the said justice. These are, therefore, in the name of the Commonwealth of Massachusetts, to command you, the said sheriff, deputies, and constables, and each of you, forthwith to convey the said E. F. to the common gaol in our county aforesaid, and to deliver him to the keeper thereof, together with this precept. And you the said keeper, in the name of the Commonwealth aforesaid, are hereby commanded to receive the said E. F. into your custody in said gaol, and him there safely to keep until he shall find such sureties as aforesaid, or be otherwise discharged in due course of law.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Forms, &c. for Search Warrants.

To A. B. Esquire, one of the Justices of the Peace within and for the county of *Suffolk*.

C. D. of in the county of on oath complains, and informs said justice, that the following goods, to wit, [*here state the articles, alleging the value of each,*] of the goods and chattels

of him the said C. D., have within days last past, by some person or persons unknown to the said C. D., been feloniously taken, stolen, and carried away out of the of the said C. D. at Boston aforesaid. And that he hath probable cause to suspect and doth suspect, that said goods, or a part thereof, are concealed in the of one E. F. of said Boston, laborer, and the said C. D. prays, that a warrant may issue, in due form of law, to search there for the same. C. D.

Suffolk ss. Received and sworn to by the said C. D. this tenth day of July, A. D. 1823. Before

A. B., *Justice of the Peace.*

Suffolk ss. To the Sheriff of the county of Suffolk, his Deputies, and to the (L. S.) Constables of the city of Boston in said county. Greeting.

In the name of the Commonwealth of Massachusetts, you and each of you are hereby commanded, forthwith, and with necessary and proper assistants, to enter in the day time into the of E. F., mentioned in the foregoing information and complaint, and there diligently to search for the goods in said information mentioned and specified; and if the same, or any part thereof, shall be found upon such seach, that you bring the goods so found, together with the body of the said E. F., if he may be found within your precinct, before me the subscriber, one of the justices of the peace within and for the county aforesaid, or some other justice of said county, to be disposed of and dealt with as to law and justice shall appertain. You are also commanded in like manner to notify the complainant to appear and give evidence touching the matter contained in said complaint, when and where you have the said goods and person, or either of them.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

*Form of a Complaint and Search Warrant, to search for Counterfeit Money and Securities, &c. by virtue of the late act of June 14, 1823, chap. 40.**

To A. B. Esq., one of the Justices of the Peace within and for the county of
Suffolk.

C. D. of &c. upon his oath complains, and informs said justice, that he has reasonable cause to suspect and doth suspect,

* This statute enacts, "that all justices of the peace, and courts, who now by law have power and authority to issue or grant search warrants for articles alleg-

that certain money and other securities, to wit, [*here describe the money and securities, bank bills, &c. if known,*] alleged to be forged and counterfeited, and certain tools, implements, and materials, used and to be used in the making, forging, and counterfeiting of money and other securities, are concealed in the of one E. F. of said Boston, laborer, and the said C. D. prays that a warrant may issue in due form of law to search for the same.

C. D.

Suffolk ss. Received and sworn to by the said C. D. this tenth day of July, 1823.

Before A. B., *Justice of the Peace.*

Form of the Warrant upon the above Complaint.

Suffolk, ss. To the Sheriff of the said county of Suffolk, and his Deputies, (L. S.) and to the Constables of the city of Boston in said county. Greeting.

In the name of the Commonwealth of Massachusetts, you and each of you are hereby commanded, forthwith, and with necessary and proper assistants, to enter in the day time into the of E. F. mentioned in the foregoing complaint and information, and there diligently to search for the counterfeit money, securities, tools, implements, and materials in the said complaint and information mentioned and specified, and if the same or any part thereof shall be found upon such search, that you bring the same, together with the body of the said E. F., if he may be found in your precinct, before me the subscriber, one of the justices of the peace within and for said county of Suffolk, or some other justice of the peace for said county, to be disposed of and dealt with as to law and justice shall appertain. You are also commanded in like manner to notify the complainant to appear and give evidence touching the matter contained in said complaint and information, when and where you shall have the said counterfeit money, securities, tools, implements, and materials, and person, or either of them.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

ed to have been stolen, shall have like power and authority to issue warrants to search for money or other securities alleged to be forged or counterfeited, and for any tools, implements, or materials, used or to be used in the making, forging, or counterfeiting of the same."

Note. In a complaint or information for a search-warrant for stolen goods, it is necessary to describe the articles stolen, and for which search is to be made; but it is apprehended that in such complaint or information upon this statute, to obtain a warrant to search for counterfeit money or securities or for tools, implements, &c. used in forging them, it is not necessary to give a particular description of the money, securities, tools, and implements, though it is always advisable to do it, when in the power of the complainant or prosecutor.

In the former case the prosecutor is presumed to have knowledge of the articles which have been in his possession, and stolen from him; but in the latter case, the forged and counterfeit money, securities, &c. cannot be presumed to have ever been in the possession of the prosecutor, and therefore the law cannot require him to give a description of them in his complaint.

Whenever the forged securities, or money, may be found and brought before a justice, by virtue of a search-warrant issued upon this statute, he ought immediately to have a private mark put upon them, by which they can be identified in any future stage of the process. They ought to be kept sealed, after the examination is completed, and in that manner delivered to the grand jury or public prosecutor.

Form of a Recognisance for the Appearance of a Person for further Examination, pursuant to a statute of Massachusetts, of 1821, chap. 98.

The penal part of the recognisance is to be taken to the Commonwealth in the form of all other recognisances. The condition to be as follows :

The condition of this recognisance is such, that whereas the said E. F. is brought before me the said justice, upon the complaint on oath of C. D. of &c. by virtue of a warrant duly issued on said complaint, in which the said C. D. complains against the said E. F. [*here insert the body of the complaint,*] and it appearing to me the said justice, that a further time for the examination of the said complaint is necessary and ought to be granted and assigned. Now if the said E. F. shall personally appear before me the said justice at my dwelling house in _____ in the county aforesaid [*or such other place as the justice shall assign for the*

that certain money and money and securities, forged and counterfeit materials, used and to be feiting of money and of one E. F. of said Bos a warrant may issue in

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... hundred and twenty-three.
... Justice of the Peace.

... further Examination.†
... Jail in Boston, in the said

... the body of E. F. herewith sent
... Esq., one of the justices of the
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... C. D. on suspicion of feloniously
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Chit. C. L. 32

xt, and until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

*Form of an Order to bring up a Prisoner for Examination.**

Suffolk, ss. To the Keeper of the Commonwealth's Gaol in the said county of Suffolk. Greeting.

You are hereby required, forthwith, to bring E. F., a prisoner in your custody, before me the subscriber, one of the justices of the peace for the said county of Suffolk, at my dwellinghouse in said Boston, [*or to my office, &c.*] for further examination.

A. B., *Justice of the Peace.*

Form of a Warrant to bring a Witness to give Evidence, who had refused to attend in Pursuance of a Summons.†

Suffolk, ss. To the Sheriff of the said county of Suffolk, his Deputies, and the (L. S.) Constables of the town of in said county. Greeting.

These are in the name of the Commonwealth of Massachusetts to command you and every of you, upon sight hereof, to take and bring before me, one of the justices of the peace in and for said county of Suffolk, the body of E. F., of whom you shall have notice, to answer all such matters and things, as on behalf of the said Commonwealth shall be, on oath, objected against him, by C. D., for that he the said E. F. being a material witness to prove a certain felony lately committed, and having been duly summoned to give evidence touching the same, hath neglected and refused to appear in pursuance of said summons, against the peace &c. Hereof fail not at your peril.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

* 4 Chit. C. L. 84.

† 4 Chit. C. L. 86, & 1 Chit. C. L. 76, 77; as to the power of justices to issue these warrants. Their power to do it is said to be unquestionable.

examination] on the day of next, to be then and there further examined touching the said complaint of the said C. D., and shall do and receive that which shall then and there be enjoined upon him by the said justice, and not depart without license, then this recognisance to be void, otherwise to remain in full force, power, and virtue.

A. B., *Justice of the Peace.*

*Form of a Commitment for further Examination.**

Suffolk ss. To the Sheriff of said county of Suffolk, his Deputies, and the (L. S.) Constables of the city of Boston, and to the Keeper of the Commonwealth's Gaol in Boston, in the said county. Greeting.

Whereas E. F. of laborer, is now brought before me A. B. Esq., one of the Justices of the peace in and for said county of Suffolk, and charged on the oath of C. D. with [*here insert the body of the complaint.*] These are therefore in the name of the Commonwealth of Massachusetts to command you the said sheriffs and constables to convey the said E. F. to the said keeper of said gaol. And you the said keeper are hereby required to receive and safely keep the said E. F. in your said gaol, until Monday the day of next, when you are hereby required to bring him the said E. F. again before me to be re-examined and further dealt with according to law. And for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Another Form of Commitment for further Examination.†

Suffolk ss. To the Keeper of the Commonwealth's Gaol in Boston, in the said (L. S.) county of Suffolk. Greeting.

Receive into your custody the body of E. F. herewith sent you, brought before me A. B. Esq., one of the justices of the peace for the said county of Suffolk, and charged before me the said justice, upon the oath of C. D., on suspicion of feloniously stealing, taking, and carrying away one gold seal, the property of him the said C. D., against the peace, and contrary to the form of the statute in such case made and provided; him, therefore, safely keep in your custody for further examination on Monday

* 4 Chit. C. L. 116.

† 4 Chit. C. L. 33.

next, and until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

*Form of an Order to bring up a Prisoner for Examination.**

Suffolk, ss. To the Keeper of the Commonwealth's Gaol in the said county of Suffolk. Greeting.

You are hereby required, forthwith, to bring E. F., a prisoner in your custody, before me the subscriber, one of the justices of the peace for the said county of Suffolk, at my dwellinghouse in said Boston, [or to my office, &c.] for further examination.

A. B., *Justice of the Peace.*

Form of a Warrant to bring a Witness to give Evidence, who had refused to attend in Pursuance of a Summons.†

Suffolk, ss. To the Sheriff of the said county of Suffolk, his Deputies, and the (L. S.) Constables of the town of in said county. Greeting.

These are in the name of the Commonwealth of Massachusetts to command you and every of you, upon sight hereof, to take and bring before me, one of the justices of the peace in and for said county of Suffolk, the body of E. F., of whom you shall have notice, to answer all such matters and things, as on behalf of the said Commonwealth shall be, on oath, objected against him, by C. D., for that he the said E. F. being a material witness to prove a certain felony lately committed, and having been duly summoned to give evidence touching the same, hath neglected and refused to appear in pursuance of said summons, against the peace &c. Hereof fail not at your peril.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

* 4 Chit. C. L. 34.

† 4 Chit. C. L. 36, & 1 Chit. C. L. 76, 77; as to the power of justices to issue these warrants. Their power to do it is said to be unquestionable.

examination] on the day of next, to be then and there further examined touching the said complaint of the said C. D., and shall do and receive that which shall then and there be enjoined upon him by the said justice, and not depart without license, then this recognisance to be void, otherwise to remain in full force, power, and virtue.

A. B., *Justice of the Peace.*

*Form of a Commitment for further Examination.**

Suffolk ss. To the Sheriff of said county of Suffolk, his Deputies, and the (L. S.) Constables of the city of Boston, and to the Keeper of the Commonwealth's Gaol in Boston, in the said county. Greeting.

Whereas E. F. of laborer, is now brought before me A. B. Esq., one of the Justices of the peace in and for said county of Suffolk, and charged on the oath of C. D. with [*here insert the body of the complaint.*] These are therefore in the name of the Commonwealth of Massachusetts to command you the said sheriffs and constables to convey the said E. F. to the said keeper of said gaol. And you the said keeper are hereby required to receive and safely keep the said E. F. in your said gaol, until Monday the day of next, when you are hereby required to bring him the said E. F. again before me to be re-examined and further dealt with according to law. And for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Another Form of Commitment for further Examination.†

Suffolk ss. To the Keeper of the Commonwealth's Gaol in Boston, in the said (L. S.) county of Suffolk. Greeting.

Receive into your custody the body of E. F. herewith sent you, brought before me A. B. Esq., one of the justices of the peace for the said county of Suffolk, and charged before me the said justice, upon the oath of C. D., on suspicion of feloniously stealing, taking, and carrying away one gold seal, the property of him the said C. D., against the peace, and contrary to the form of the statute in such case made and provided; him, therefore, safely keep in your custody for further examination on Monday

* 4 Chit. C. L. 116.

† 4 Chit. C. L. 33.

next, and until he shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

*Form of an Order to bring up a Prisoner for Examination.**

Suffolk, ss. To the Keeper of the Commonwealth's Gaol in the said county of Suffolk. Greeting.

You are hereby required, forthwith, to bring E. F., a prisoner in your custody, before me the subscriber, one of the justices of the peace for the said county of Suffolk, at my dwellinghouse in said Boston, [or to my office, &c.] for further examination.

A. B., *Justice of the Peace.*

Form of a Warrant to bring a Witness to give Evidence, who had refused to attend in Pursuance of a Summons.†

Suffolk, ss. To the Sheriff of the said county of Suffolk, his Deputies, and the (L. S.) Constables of the town of in said county. Greeting.

These are in the name of the Commonwealth of Massachusetts to command you and every of you, upon sight hereof, to take and bring before me, one of the justices of the peace in and for said county of Suffolk, the body of E. F., of whom you shall have notice, to answer all such matters and things, as on behalf of the said Commonwealth shall be, on oath, objected against him, by C. D., for that he the said E. F. being a material witness to prove a certain felony lately committed, and having been duly summoned to give evidence touching the same, hath neglected and refused to appear in pursuance of said summons, against the peace &c. Hereof fail not at your peril.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

* 4 Chit. C. L. 34.

† 4 Chit. C. L. 36, & 1 Chit. C. L. 76, 77; as to the power of justices to issue these warrants. Their power to do it is said to be unquestionable.

Form of Commitment of a Witness for refusing to give Evidence.*

Suffolk ss. To the Keeper of the Commonwealth's Gaol in Boston, in the
(L. S.) said county of Suffolk. Greeting.

Receive into your custody the body of E. F. herewith sent you, brought before me A. B. Esq., one of the justices of the peace within and for the said county of Suffolk. For that he the said E. F., having knowledge that a certain felony and robbery was committed upon the person of C. D. on the day of last past, at said Boston, and touching which the said E. F. can give material evidence, hath refused to be examined on oath respecting the same. The said E. F., therefore, you are safely to keep in your said custody, until he shall submit to be examined, touching the said felony and robbery, or shall be discharged by due course of law, and for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

Form of Examination of Prosecutor or Witness.†

Suffolk ss. The information of C. D. of in the said county, yeomen, taken upon oath before me A. B. Esq., one of the justices of the peace within and for the said county of Suffolk, on the tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three, in the presence and hearing of E. F. charged before me by C. D. of yeoman, with &c. [*state the offence as contained in the information or complaint,*] which said C. D. on his oath aforesaid, before me the said justice, in the presence and hearing of the said E. F., saith, that [*here state the evidence fully.*] Taken before me the day and year abovementioned.

A. B., *Justice of the Peace.*

Examination of Prisoner.‡

Suffolk ss. The examination of E. F. of yeoman, taken before me, one of the justices of the peace within and for the said county of Suffolk, on the tenth day of July, in the year

* 4 Chit. C. L. 26, & 1 Chit. C. L. 76, 77; as to the power of justices to commit witnesses.

† 4 Chit. 39; 1 Chit. 88, as to examination of prisoners.

‡ *Ib.*

of our Lord one thousand eight hundred and twenty-three, the said E. F. being charged before me by C. D. of Boston, yeoman, with the felonious stealing, taking, and carrying away, on the said tenth day of July, in the year aforesaid, at said Boston, one silver tankard, of the value of fifty dollars, of the goods and chattels of him the said C. D. He the said E. F. upon his examination now taken before me saith, that [*set forth the substance of prisoner's statement.*] E. F. [*Prisoner's signature.*]

Taken before me the day and year abovementioned.

A. B., *Justice of the Peace.*

*Examination and Confession of Prisoner.**

[*The commencement as in the next preceding form.*]

The examinant voluntarily confesseth and saith, [*here state the matter of the confession, and conclude as follows :*] and lastly this examinant saith, &c.

Signed E. F. [*the Prisoner.*]

Commitment of a Witness for want of Sureties to appear and testify on the Trial.

Suffolk ss. To the Keeper of the Commonwealth's Gaol in Boston, in the said county of Suffolk. Greeting.

Receive into your custody the body of E. F. herewith sent you by me, A. B. Esq., one of the justices of the peace in and for the said county of Suffolk, it appearing to me by the information of the said E. F., taken on oath before me, that the said E. F. is a material witness against I. J. now committed by me to the Commonwealth's gaol aforesaid, on a charge on oath against him by C. D. &c. [*here insert the body of the charge,*] and the said E. F. admitting to me the said justice, [*or it appearing to my satisfaction,*] that he has no settled place of residence, and that he is not possessed of goods or chattels, lands or tenements, whereon to levy the penalty of a recognisance ; and being required by me the said justice, to find sureties for his personal appearance at the next Supreme Judicial Court to be holden at &c. to give evidence before the grand jury, and before the said Supreme Judicial Court, relative to the complaint and charge aforesaid, against the said I. J. And the said E. F. now neglecting and refusing to find such sureties to give evidence as aforesaid, for want of such sureties, you are commanded him safely to keep until the said session of the said Supreme Judicial

† See ante, p. 72, as to examination and obtaining confession of prisoner.

Court, there to give such evidence, unless he shall be sooner discharged by a due course of law ; for which this shall be your sufficient warrant.*

A. B., *Justice of the Peace.*

Form for backing Warrants.

Suffolk ss. To the Sheriff of the said county of Suffolk, his Deputies, and to (L. s.) the Constables of the town of in the county aforesaid. Greeting.

Whereas proof upon oath hath been made before me, A. B. Esq., one of the justices of the peace in and for the county aforesaid, that the name of C. D. is of the hand writing of the justice of the peace within mentioned ; I do hereby authorize you the said sheriffs and constables, and all other persons to whom the said warrant is directed, to execute the same within the said county of Suffolk.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

* When a witness admits before the justice, that he intends to absent himself at the time of trial, it is, according to the English authorities, another cause for requiring such witness to find sureties for his appearance to give evidence. This power of requiring a witness to find sureties for his appearance to give evidence, has never been exercised in this state, and is doubted and denied by men of eminent professional character and talents. But I have inserted a precedent for such a recognisance, for the use of those who may think proper to exercise the power of requiring it. There may be cases where the safety of the public, and the punishment of the guilty, must depend upon the exercise of this power ; as where the witness avows his intention to absent himself from the trial, or where he has no property to respond the penalty of his recognisance, and yet may be so connected with the party accused, as to preclude all expectation of his appearance at the trial.

There are other precedents in the books for the commitment of witnesses for not finding sureties for their appearance to testify, who have been admitted by the justice as state's evidence, as it is called ; that is, who have been admitted to testify on behalf of the state, under a stipulation that they shall be pardoned, or otherwise benefitted thereby. But no justice of the peace in this state has the power to make any such stipulation or agreement with an accomplice, or any other person whatever. And whoever undertakes to do it is guilty of a gross violation of duty, which may be extremely injurious both to himself and the party thus favored.

It is the practice in the Circuit Courts of the United States, to commit witnesses to prison for want of sureties for their appearance to testify ; especially in capital offences. No doubt this power is entertained by the judges of the Courts of the United States. There are now three citizens in the gaol in the city of Boston, committed for want of such sureties.

*Commitment by a Justice, upon View, for insulting him in the Execution of his Office.**

Suffolk ss. To the Keeper of the Commonwealth's Gaol in Boston in the
(L. s.) said county of Suffolk.

Receive into your custody the body of E. F. herewith sent you by me the subscriber, A. B. Esq., one of the justices of the peace within and for the said county of Suffolk, and charged by me the said justice, upon the view of me the said A. B. Esq., one of the justices of the peace in and for the said county of Suffolk for indecent behaviour, by insulting me and obstructing me in the due and lawful execution of my office as a magistrate as aforesaid, against the peace of the said Commonwealth. Him the said E. F. therefore safely keep in your custody for the want of sureties, or until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the Peace.*

PROCEEDINGS UPON THE STATUTE FOR THE MAINTENANCE OF
BASTARD CHILDREN.

Form of Examination and Accusation of the Woman.

The voluntary examination and accusation of _____ of _____ in the county of _____ single woman, taken on oath before me, A. B. Esq., one of the justices assigned to keep the peace in and for said county who saith, that she _____ child _____ and that the said child _____ born a bastard, and accuses _____ of _____ in the county of _____ of being the father of said child, and that he did beget her with child in _____ in the county of _____ on or about the _____ day of _____ at [here insert such circumstances as the justice shall think necessary for the discovery of the truth of the accusation.] The said _____ therefore prays that he the said _____ may be apprehended, and held to answer to this accusation, and further dealt with thereon according to law.

Taken, signed, and sworn to, on this tenth day of July, in the year of our Lord one thousand eight hundred and twenty-three.

Before me, A. B., *Justice of the Peace*

* 4 Chit. C. L. 66; 2 Barnard, 155—but see Hawk. b. 2, c. 16, s. 16.

Form of the Warrant to apprehend the Party accused.

Suffolk ss. To the Sheriff of said county or his Deputy, or to either of the (L. S.) Constables of the town of in said county. Greeting.

Whereas by her voluntary examination, hath declared that she child and that the said child born a bastard, and accuses of in the county of of being the father of said child, and hath prayed process against the said Therefore, in the name of the Commonwealth of Massachusetts, you the said sheriffs and constables, or either of you, are hereby required forthwith to apprehend the said (if in your precinct,) and to bring him before me the subscriber, or some other justice of the peace, in and for said county of to find sufficient sureties, as well for his personal appearance at the next to be held at in and for said as that he shall abide such order or orders as shall then and there be taken in pursuance of a law of said Commonwealth in such case made and provided.

Given under my hand and seal, at aforesaid, the day of in the year of our Lord one thousand eight hundred and twenty-three.

A. B., *Justice of the peace.*

The Mittimus for not finding Sureties to perform the Order of Court.

Suffolk ss. To the Keeper of the Gaol in said county. Greeting.

Whereas single woman, in her voluntary examination on oath, this day taken before me, A. B. Esq., one of the justices assigned to keep the peace in and for said county, hath declared herself to be with child, and that the said child is likely to be born a bastard, and become chargeable to said town of and hath accused of in the county with having begotten her with child of said bastard child: And whereas the said now present before me refuses to find sufficient sureties for his personal appearance at the next Circuit Court of Common Pleas, to be held at in and for said county, to answer to said charge, and to abide and perform such order or orders as shall then and there be made as required by me the said justice, to wit, himself as principal in the sum of dollars, with sufficient sureties in a like sum: You the said keeper are hereby required to receive the said into your custody in

said gaol, and him there safely to keep until he shall give security as aforesaid, or be otherwise discharged by due order of law.

Given under my hand and seal at aforesaid, the
day of in the year of our Lord

A. B., *Justice of the Peace.*

Form of the Bond to be taken to abide the Order of Court.

Know all men by these presents, that we of as principal, and of as sureties, are indebted to of in the just sum of to the payment of which we hereby bind ourselves, our executors and administrators. Dated this day of in the year of our Lord one thousand eight hundred and

The condition of this obligation is such, that whereas the said hath on her examination on oath, taken before Esq., justice of the peace within the county of on the day of in the year aforesaid, accused the said of being the father of a bastard child of which she and the said justice hath ordered him the said to give sureties for his appearance at the next to be holden in and for the said on the day of next, then and there to answer to the said accusation. Now if the said shall appear at the said court, and answer to the said accusation, and abide the order of the court thereon, this bond shall be void ; otherwise shall remain in full force and virtue.

*Signed, sealed, and delivered,
in presence of us,*

(s. J.)
(s. C.)
(s. S.)

HAVING, in the First Part of this work, pointed out the duty of a justice of the peace in the different stages of a criminal prosecution ; and in the commencement of this Second Part, given the form of a justice's record in all its parts, from the commencement to the conclusion, together with other forms made use of in such prosecutions, the residue of the volume will contain the forms and precedents of complaints before a justice, for all the crimes both at common law and by statute, which are the subjects of a public prosecution. These will be given under the heads of the different offences, alphabetically arranged ; and, it is hoped, will be a sufficient guide to justices of the peace in all their proceedings in these cases. Many of them are taken from the precedents of indictments in the English books. Those which are founded upon our statutes, must necessarily, in many cases, be original. These forms, however, have become familiar from long official experience ; and many of them are taken from precedents in cases which have been the subjects of judicial animadversion. As was originally proposed, they will be introduced or accompanied with definitions taken from approved authorities, and concise preliminary remarks, notes, and directions.

It will be noticed that certain expressions, which are still retained in the English precedents, are here rejected ; such as the following, used in indictments for capital offences, *viz.* "not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil ;" and the phrase "in the peace of God then and there being." As it has been long settled, that these allegations are not necessary to the validity of an indictment, or any other criminal accusation,* it is high time they were expunged from the records of judicial proceedings. There is a degree of irreverence, which nothing but the antiquity of the practice can excuse, in introducing the sacred name of the Deity upon these common occasions ; and as to the other phrase, it is never pronounced in the courts of this country without exciting a smile of ridicule in the audience.

* 2 Hale, 185, Burns J. Indictment IX ; 6 East, 472, 473, 474.

ACCESSARY.

SEE Larceny, Murder, Robbery, Rape, Arson, Maim, Burglary, where will be found the forms of complaints against accessaries to each of the several offences.

An accessary is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed.*

There can be no accessaries in treason, for all who are concerned are principals; the same acts which make a man accessary in felony, make him a principal in treason, because of the heinousness of the crime.† So also in all other crimes below the degree of felony, there can be no accessaries; but all persons concerned therein, if guilty at all, are principals;‡ the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals on account of the heinousness of the crime; in trespass, all are principals, because the law does not descend to distinguish the different shades of guilt in petty misdemeanors.§ In manslaughter, there can be no accessaries *before* the fact, because it is in its nature sudden and unpremeditated.

An accessary *before* the fact, is he, that being absent at the time of the actual perpetration of the felony, procures, counsels, commands, invites, or abets another to commit it. If a person be *present*, and aiding and abetting, he cannot be charged as an accessary.|| As to what acts will implicate a man as accessary before the fact, see 1 Chitty's Crown Law, 262, 263, 264, and the numerous authorities there referred to.

An accessary *after* the fact, may be where a person knowing a felony to have been committed by an individual, receives, relieves, comforts, or assists the felon.¶ This arises in cases of felony alone, for there can be no accessaries *after* the fact at common law, to any trespass or misdemeanor. In order to charge a person as accessary after the fact, the felony must be

* 4 Bla. Com. 35. † 1 Chit. C. L. 261, and the books there quoted.

‡ Ibid. § 4 Bla. Com. 36. || Ibid. ¶ 4 Bla. Com. 37; 1 Hale, 618.

completed ; he must *know* the felon to be guilty ; and he must *receive, relieve, aid, or assist* him. As to what acts will implicate a person as accessory after the fact, see also 1 Chitty's Crown Law, 264, 536. To receive stolen goods, knowing them to be stolen, not falling under any of the descriptions of the common law, did not constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment.* But by several statutes, the receivers were made accessories, and punishable in the same degree and manner as accessories after the fact.†

The offence of being an accessory to a crime, can only refer to *felonies*, whether by common law, or made so by statute ; concerning which it is generally true, that when an offence is felony, either by common law or by statute, all accessories, both before and after the fact, are incidentally included.‡ But if the statute that creates the felony comprehend, in express terms, accessories *before*, and make no mention of accessories *after* the fact, it seems there can be no accessories after, for in such case the construction would be, that accessories after were not intended to be included ; which is an offence of a lower degree, than accessories before.§

The precedents of complaints before a justice against accessories for the several felonies, made and punished as such by our law, will be found under the head of each felony. Complaints against accessories in larceny, will be found among the forms of complaints for larceny, (and so of all the other felonies,) where it is most convenient to place them ; that all the forms relative to each offence, and all that relates to it, may be collected and placed together.

* 1 Hale, 620 ; 1 Chit. C. L. 625, 626. † 3 Mass. Laws, 299.

‡ Burns J. Accessary I. § Ibid. ; 1 Hale, 614.

ABORTION.

It was anciently holden, that the causing of an abortion, by giving a potion to, or striking a woman big with child, was murder; but it is now considered a great misprision only, and not murder, unless the child be born alive and die thereof, in which case it is murder.* This agrees also with the Mosaical law.† The case of the *Commonwealth v. Bangs*‡ settles several points relative to this offence. An indictment for administering a potion, with intent to procure an abortion, must contain an allegation that an abortion ensued; and that the woman was *quick with child*. Both these points were decided in that case.

There has been a late English statute§ upon this subject, making it felony without benefit of clergy to administer drugs to a woman quick with child. It is also an offence at common law; as appears from the authorities below, and precedents of indictments in the English books.||

*Form of a Complaint at Common Law, for administering a
Potion to cause an Abortion.*

[Commencement as ante, p. 137.] A. B. of B. in the county of S., yeoman, upon his oath complains, that C. D. of in the county of [addition] on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid did unlawfully, wilfully, and maliciously, administer to, and cause to be administered to, and taken by, one E. F., single woman, then and there being quick with child, divers large quantities of a certain noxious and destructive substance, called savin, with intent thereby to cause the abortion, miscarriage, and premature birth of the said child with which she the said E. F. was then and there pregnant and quick; by means whereof, the abortion, miscarriage, and premature birth of the said child was caused and produced, and she the said E. F. afterwards, to wit, on the day of next following, at said B., by means of the noxious and destructive substance aforesaid, so as aforesaid, ad-

* Hawk. b. 1, c. 31, s. 16. † Exodus, c. 21, v. 22, 23. ‡ 9 M. R. 387. § 43 Geo. III.

|| 3 Inst. 50; Staunt. 21; 1 Hale, 438; 1 Hawk. c. 31, s. 16; 4 Black. Com. 198; 1 East, p. 6, c. 5, s. 14; *Commonwealth v. Bangs*, 9 M. R. 387.

ministered by the said C. D., and taken by the said E. F., was prematurely delivered of the same child ; against the peace and dignity of the Commonwealth aforesaid &c. Wherefore [*Conclusion as ante*, p. 137.]

For causing an Abortion by an Instrument.

A. B. of B., in the county of S., upon his oath complains, that C. D. of in the county of [*addition*] on the day of now last past, with force and arms at B. aforesaid, in the county aforesaid, did unlawfully, wickedly, and inhumanly, force and thrust a certain instrument, called a which he the said C. D. in his right hand then and there had and held, up and into the womb and body of one E. F., she the said E. F. being then and there pregnant and quick with child, with a wicked intent to cause and procure the said E. F. to miscarry and to bring forth the said child, of which she was then and there as aforesaid pregnant and quick ; and that she the said E. F. afterwards, to wit, on the day of then next ensuing, at B. aforesaid, by means of the forcing and thrusting of the said instrument into the womb and body of her the said E. F. by the said C. D. in manner aforesaid, did bring forth the said child, (of which she was so pregnant and quick,) dead. Wherefore the said A. B. &c. [*Conclusion as ante*, p. 137.]

ARTICLES OF PEACE.—See “Surety of the Peace” and “Good Behaviour.”

ARSON.—See “Burning.”

ADULTERY.

In England, the temporal courts take no cognisance of the crime of adultery, otherwise than as a private injury. There are, of course, no precedents of indictments for this offence, in the common law courts ; but it is left to the feeble coercion of the spiritual courts, according to the rules of the canon law.* By the statutes of this Commonwealth† it is severely punished by indictment in the Supreme Judicial Court.

* 4 Bl. Com. 64.

† Statute 1784, chap. 40.

Form of a Complaint for Adultery, by a married Man with an unmarried Woman.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of yeoman, on the day of now last past, at B. aforesaid in the county aforesaid, did commit the crime of adultery with one E. F. of said spinster; by then and there having carnal knowledge of the body of her the said E. F., he the said C. D. being then and there a married man, and having a lawful wife alive; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*Conclusion as ante, in the general form of a complaint, p. 137.*]

For Adultery, by a married Man with a married Woman.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, did commit the crime of adultery with one E. F., the wife of one G. H., by having carnal knowledge of the body of her the said E. F.; he the said C. D. being then and there a married man, and having a lawful wife alive; and she the said E. F. being then and there a married woman, and the lawful wife of the said G. H.; against the peace of said Commonwealth, and against the form of the statute in such case made and provided. Wherefore &c. [*as ante, p. 137.*]*

ASSAULTS AND BATTERIES.

An assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with or without a weapon; or presenting a gun at him, at a distance to which the gun will carry; or pointing a pitchfork at him, stand-

* When a magistrate binds over or commits a person to be tried for this offence, he should direct the complainant to be prepared with the evidence of the marriage of the parties accused, to be laid before the grand jury. A witness present at the marriage is the best evidence of its being solemnized.

ing within the reach of it ; or by holding up the fist at him, or by any other similar act, done in an angry, threatening manner.* A person, charged with an assault and battery, may be found guilty of the former, and acquitted of the latter. Every battery includes an assault ; but no words whatsoever can amount to an assault.†

Every injury whatever, be it ever so small, if actually done to the person of another, in an angry, rude, revengeful, or insolent manner, as by spitting in his face, or in any way touching him in anger, or jostling him out of the way, is a battery in the eye of the law.‡ But where a man, in his own defence, beats another who first assaults him, he may take advantage of it upon a criminal prosecution as well as upon a civil action ; but with this difference, that in the first case he may give it in evidence upon the plea of not guilty, and in the latter he must plead it specially.§

Form of a Complaint for an Assault, not accompanied with a Battery.||

[*The commencement of the complaint, as in the general form, ante, p. 137.*] A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day now last past, with force and arms, at aforesaid, in the county aforesaid, in and upon him the said A. B., in the peace of the said Commonwealth then and there being, with a certain offensive weapon, which he the said C. D. in his right hand then and there had and held, called a cane, did make an assault ; and other wrongs to the said A. B. then and there did and committed, to the great injury of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. [*Conclusion as in the general form, ante p. 137.*]

* Hawk. b. 1, c. 62, s. 1.

† Id.

‡ Id. s. 2.

§ Id. s. 3.

|| It is remarkable that several of the books of precedents of indictments do not contain any forms for assaults unaccompanied with a battery. The principle, that in many cases the higher includes the lesser offence, and that therefore, when the facts will not warrant a charge for the former, the party may be convicted of the latter upon the same indictment, is no justification for finding a bill, or swearing to a complaint which is not true. There are exceptions, however, in cases of homicide, when the grand jury will be cautious in deciding upon the difference between murder and manslaughter ; they ought in general to leave that to the court and traverse jury.

For a common Assault and Battery.

A. B. of B., in the said county of S. [addition], upon his oath complains, that C. D. of B. in the said county of S. [addition] on the day of in the year of our Lord one thousand eight hundred and twenty-two, with force and arms at B. aforesaid, in the county of S. aforesaid, in and upon the body of the said A. B., in the peace of said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat, wound, and ill treat, and other wrongs to the said A. B. then and there did, to the great injury of him the said A. B. and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

Far Assault and Battery, by casting a Person on a Brick Floor, kicking him, &c.

A. B. of B., in the county of S., laborer, upon his oath complains, that C. D. of B. in the county of S., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of said Commonwealth then and there being, did make an assault, and him the said A. B. did then and there beat, wound, bruise, and ill treat; and that the said C. D. with both his hands did then and there violently cast and throw the said A. B. upon and against a certain brick floor there, and him the said A. B., in and upon his head, breast, back, sides, and other parts of his body, with the feet of him the said C. D. then and there violently and grievously did kick, strike, and beat, giving to the said A. B. then and there, as well by such casting and throwing of him the said A. B., as also by such kicking, striking, and beating of the said A. B. as aforesaid, in and upon the head, breast, back, sides, and other parts of the body of him the said A. B., divers bruises, hurts, and wounds; and other wrongs to the said A. B. then and there did and committed, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore the said A. B. &c. [*Conclusion as ante*, p 137.]

For an Assault, and beating out an Eye.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him

the said A. B., in the peace of the said Commonweath then and there being, did make an assault, and him the said A. B. did then and there beat, wound, bruise, and ill treat, so that his life was thereby greatly endangered; and that he the said C. D., with his right hand, the said A. B. in and upon the left eye of him the said A. B. then and there unlawfully, violently, and maliciously did strike; by means whereof the said A. B. then and there, the use, sight, and benefit of his said left eye, entirely lost and was deprived of; and also by means of the premises, the said A. B. became sick, languid, and distempered, and remained so sick, languid, and distempered, for a long time, to wit, for the space of three months; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore the said A. B. &c. [*Conclusion as ante*, p 137.]

For an Assault, and tearing the Hair off the Complainant's Head.

A. B. of B., in the county of S. [*addition*], upon her oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county of aforesaid, in and upon the body of her the said A. B., in the peace of the said Commonwealth then and there being, did make an assault, and her the said A. B. did then and there beat, wound, bruise, and ill treat; and also that he the said C. D. did then and there unlawfully and violently seize and lay hold of the said A. B. by the hair of her head, and did then and there with great force, wrath, and violence, pull and drag the said A. B. by the same, by means whereof he the said C. D. did then and there unlawfully and cruelly pull and tear the hair of the head of her the said A. B. off by the roots, and the head of her the said A. B. was thereby grievously wounded and hurt, and the said A. B. thereby put to great pain and torture; and other wrongs to the said A. B. then and there did, to the great damage of the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore the said A. B. &c. [*Conclusion as ante*, p. 137.]

For an Assault upon a Constable in the Execution of his Office.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of [*addition*] on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon the body

of him the said A. B., he being then and there one of the constables of the said town of B., legally authorized and duly qualified to discharge and perform the duties of said office, and being then and there in the due and lawful execution of the same, and also being then and there in the peace of said Commonwealth, did make an assault, and him the said A. B. did then and there beat, wound, and ill treat, and in the due and lawful execution of his said office, did then and there unlawfully obstruct, hinder, and oppose; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore the said A. B. &c. [*Conclusion as ante*, p. 137.]*

For an Assault and false Imprisonment.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat, wound, and abuse; and him the said A. B. then and there against his will, and without his consent, unlawfully, without any warrant or justifiable cause whatever, did imprison, detain, and hold in duress for the space of three days then next following; and other wrongs to the said A. B. then and there did and committed, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth. Wherefore &c. [*as ante*, p. 137.]

For an Assault with a Cane.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of the said A. B., in the peace of said Commonwealth

* This form may be used, *mutatis mutandis*, for assaults upon all other officers, as sheriffs, coroners, and others. If the evidence should not be sufficient to convict the defendant of an assault upon the officer in the execution of his office, he may be found guilty, upon this complaint, of a common assault and battery. Such is now the common practice. In such case the record will be, that the party "is not guilty of the assault upon the complainant in the execution of his office, but guilty of an assault and battery upon the said complainant."

then and there being, did make and assault, and him the said A. B. with a large cane, which the said C. D. then and there in his right hand had and held, did strike divers grievous and dangerous blows upon the head, back, shoulders, and other parts of the body of him the said A. B., whereby the said A. B. was cruelly and dangerously beaten, bruised, and wounded, and his life greatly endangered ; and other wrongs to the said A. B. then and there did and committed, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For an Assault upon a Collector of a Turnpike Corporation
in the Execution of his Office.*

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said A. B., in the peace of the said Commonwealth then and there being ; and he the said A. B. being also then and there one of the collectors of the monies and toll payable by virtue of a certain act or law of this Commonwealth, made and passed in the year of our Lord one thousand eight hundred and entitled "an act [*here insert the title of the act of incorporation correctly and verbatim*], and being then and there in the due and lawful execution of the said office of collector of such monies and toll, did make an assault, and him the said A. B. did then and there beat, wound, and abuse ; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For assaulting the Driver of a Chaise, and overturning the
Chaise with the wheel of a Cart..*

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of truckman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said A. B., in the peace of the said Commonwealth, and in a certain chaise drawn by one horse in the common highway, then and there being, an insult did make ; and that the said C. D., then and there driving a horse drawing a cart, did in the highway aforesaid, unlawfully, violently, and maliciously drive the said horse, so as aforesaid drawing said cart, to and against the

said chaise ; and by such driving did then and there, in the highway aforesaid, unlawfully and maliciously force the said cart against the said chaise ; and that he the said C. D., with one of the wheels of said cart, did then and there in the highway aforesaid, unlawfully and maliciously overturn the said chaise, in which the said A. B. then and there was as aforesaid ; by means of which overturning of the aforesaid chaise, he the said A. B. was then and there grievously hurt, bruised, and wounded ; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of said Commonwealth. Wherefore &c.

For an Assault, and encouraging a Dog to bite.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of in the year of our Lord one thousand eight hundred and with force and arms, at B. aforesaid, in the county aforesaid, in and upon him the said A. B., in the peace of the said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat and abuse, and that he the said C. D. did then and there unlawfully incite, provoke, and encourage a certain dog belonging to him the said C. D., him the said A. B. then and there to beset and bite ; by means whereof the same dog then and there did grievously bite the leg of him the said A. B., whereby his said leg was grievously hurt and wounded, and his life greatly endangered ; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For an Assault upon a Woman quick with Child.

A. B., the wife of E. F. of B., in the county of S., upon her oath complains, that C. D. of in the county of yeoman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon her the said A. B., in the peace of the said Commonwealth then and there being, and also being then and there pregnant with a quick child, did make an assault, and her the said A. B. did then and there beat, wound, and abuse, so that her life was thereby greatly endangered ; by reason whereof she the said A. B. afterwards, to wit, on the day of in the same month of at B. aforesaid, did bring forth the said child dead ; and other

wrongs to the said A. B. then and there did, to the great injury of her the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For riding over a Person with a Horse.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat, wound, and ill treat, and that he the said C. D. did then and there unlawfully and maliciously, and with great force and violence, ride and drive a certain horse against, upon, and over the said A. B., and thereby grievously wounded, bruised, and ill treated him, whereby his life was then and there greatly endangered; and other wrongs to the said A. B. then and there did and committed, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For an Assault, and presenting a loaded Gun, and threatening to fire it.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of yeoman, on the day of now last past, with force and arms, at in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat, ill treat, and abuse; and that he the said C. D. did then and there level and point at the said A. B. a certain gun, which he the said C. D. in his hands then and there had and held, loaded with gunpowder and leaden balls, and did then and there, with the said gun so loaded, levelled, and pointed at the said A. B., threaten to shoot the said A. B., and did thereby put the said A. B. in great peril and danger of his life, and did thereby greatly terrify and frighten him; and other wrongs he the said C. D. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For an Assault, and violently taking away a Receipt for a Debt.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, an assault did make, and him the said A. B. did then and there beat, wound, and ill treat ; and that he the said C. D. then and there unlawfully, violently, and injuriously, did seize and take from the custody of him the said A. B., and against his will and consent, a certain accountable receipt, bearing date the day and year aforesaid, purporting to be a receipt of one E. F. [*here describe the receipt as accurately as possible ;*] and the same receipt he the said C. D. did then and there unlawfully and wilfully detain and keep in his possession ; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For an Assault upon a Minister of the Gospel, whereby he was rendered incapable of doing his Duty.

A. B. of B., in the county of clerk, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, and he the said A. B. being then and there a settled and ordained minister of the gospel in the said town of B., an assault did make, and him the said A. B. did then and there beat, wound, and ill treat ; and that he the said C. D., with both his fists, did strike divers grievous and dangerous blows upon the head, face, and other parts of the body of him the said A. B., whereby he was dangerously and grievously wounded and bruised ; by means whereof the said A. B. became sick, distempered, and debilitated, for the space of thirty days then next ensuing, and, during all the time last mentioned, suffered great bodily pain and anguish, and was also thereby prevented from, and rendered incapable, during all the said time last mentioned, of officiating in, and performing the duties of his office and function, as a settled minister of the gospel in the said town of B. ; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For an Assault, with Intent to maim.**

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, and being then and there armed with a certain dangerous weapon called a knife, which he the said C. D. in his right hand then and there had and held, did make an assault, with an intention him the said A. B., with set purpose and aforethought malice, unlawfully to maim and disfigure, by unlawfully cutting off the left ear of him the said A. B.; and other wrongs to the said A. B. then and there did, to the great injury of him the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.† Wherefore the said A. B. prays &c.

For a felonious Assault, with a drawn Sword, with Intent to murder.‡

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., mariner, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, with a certain dangerous weapon, to wit, with a drawn sword, with which he the said C. D. was then and there armed, and which he the said C. D. in his right hand then and there held, did make an assault, with an intention him the said A. B. then and there, with the drawn sword aforesaid, feloniously, wilfully, and of his malice aforethought, to kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.§ Wherefore &c. [*as ante*, p.137.]

* 3 Mass. Laws, 283, 284.

† This precedent may be used in all cases arising under the statutes, by varying the allegation as to the particular mode in which it was the intention of the party to maim or disfigure, which must always be alleged in the precise words of the statute.

‡ Mass. Laws, stat. 1804, chap. 122; also a late statute, passed Feb. 19, 1819, increasing the punishment of this offence.

§ This form will answer in all cases of felonious assaults with a dangerous weapon, with intent to murder, varying the description of the weapon, according to the fact; as "with a certain dangerous weapon called a pistol, loaded with gunpowder and leaden bullets."

For a felonious Assault, and casting into a Pond with Intent to drown and suffocate.

A. B. of B., in the county of S. [addition], upon his oath complains, that C. D. of in the county of [addition], on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, and upon the body of him the said A. B., in the peace of said Commonwealth then and there being, with a dangerous weapon, to wit, with a large stick, which he, the said C. D., in both his hands then and there had and held, did make an assault, and him the said A. B. did then and there beat, wound, bruise, and ill treat; and that he the said C. D., with both his hands, did then and there unlawfully, violently, and maliciously cast, push, and throw the said A. B. into a certain pond there situate and being, wherein was a large quantity of water, and did then and there keep, press down, and confine the said A. B. in and under the said water, with intention him the said A. B. then and there feloniously, wilfully, and of his malice aforethought, to suffocate and drown in the said water, and him the said A. B. by means thereof to kill and murder; and other wrongs to the said A. B. then and there did, to the great damage of him the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*as ante*, p. 137.]

For a felonious Assault, with Intent to commit a Rape.

A. B. of B., in the county of S., single woman and spinster, upon her oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon her the said A. B., in the peace of said Commonwealth then and there being, did make an assault, with intent her the said A. B. then and there feloniously to ravish and carnally know, by force and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

* Mass. Laws, stat. 1805, chap. 97.

*For a felonious Assault, with intent carnally to know and abuse
a female Child under the age of ten Years.**

A. B. of B., in the county of S. [addition], upon his oath complains, that C. D. of B. aforesaid, in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., spinster, a woman child under the age of ten years, to wit, of the age of eight years, in the peace of the said Commonwealth then and there being, did make an assault, with intent her the said E. F. wickedly and feloniously to carnally know and abuse; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*For a felonious Assault by two Persons upon a woman, with In-
tent that one of them should ravish her.†*

A. B. of B., in the county of S., spinster, upon her oath complains, that C. D. and E. F. of in the county of laborers, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon her the said A. B., in the peace of the said Commonwealth then and there being, did make an assault, with intent that he the said C. D. should then and there feloniously ravish and carnally know her the said A. B. by force and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For an Assault with intent to rob.‡

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of the said Commonwealth then and there being, with a certain dangerous weapon called a pistol, then and there loaded with gunpowder and leaden bullets, with which he the said C. D. was then and there armed, and which he the said C. D. in his right hand then and there had

* Mass. Laws, stat. 1815, chap. 86, by which the aforesaid punishment is enhanced.

† Mass. Laws, stat. 1815, chap. 86.

‡ Mass. Laws, stat. 1804, chap. 148; also the late statute 1818, chap. 124.

and held, and also with other actual violence, did make an assault, with intent the moneys, goods, and chattels of him the said A. B. from the person, and against the will of him the said A. B., feloniously and by force and violence, and by assault and putting him in bodily fear and danger of his life, to steal, take, and rob, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*For an Assault, with Intent to steal; on the ninth Section of the Statute for the Punishment of Robberies and Larcenies.**

A. B. of B., in the county of S., upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the body of him the said A. B., in the peace of said Commonwealth then and there being, with a dangerous weapon, to wit, with a pistol, did make an assault, with intent the goods, chattels, and moneys of him the said A. B. from the person of him the said A. B. openly and violently [*or privily and fraudulently, as the case may be,*] to steal, take, and carry away; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

BARRATRY.

BARRATRY is an offence at common law, and signifies the habitual moving, exciting, or maintaining suits and quarrels, either at law or otherwise. All kinds of disturbance of the peace, spreading false rumors and calumnies &c., come under this denomination.† But a man cannot be thus guilty in respect to a single act. Nor can an attorney be indicted for this crime merely from maintaining another in a groundless suit. It has been said that married women cannot be thus guilty; but the better opinion is otherwise; for as they are able to excite quarrels, they ought to answer for them.‡

* Mass. Laws, stat. 1804, chap. 143.

† 4 Black. Com. 134; 1 Hawk. b. 1, c. 81.

‡ Id.

Barratry is one of those excepted cases, where it is not necessary to charge any specific act, or specify any particular place, in the form of the complaint; but the allegation is, that the defendant is a *Common Barrator*; the reason of which is, that the offence consists in habitual conduct, and not in a single malfeasance, and involves several acts, which may be presumed to be done in different places.* But before the trial, notice in writing of the particular acts, intended to be relied upon, must be given to the defendant.

An offence of equal malignity and audaciousness is that of suing another in the name of a fictitious plaintiff; either one who is not in being at all, or who is ignorant of the suit.† This offence not only partakes of the nature of barratry, but is a high contempt of the court in which the suit is prosecuted, and punished accordingly. Several cases of this latter kind have occurred in the Supreme Court of this state, and the offenders have been punished for them. And by a late statute,‡ justices of the peace, and other officers therein named, are prohibited from purchasing, in any way or manner, any promissory note, account, or any other demand, for the purpose of making to themselves any gain or profit from the writs or fees arising in the collection thereof, by a suit at law, under the penalty of a sum not exceeding five hundred, nor less than twenty dollars for each offence.

Form of a Complaint, for being a Common Barrator.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of Esq., on the first day of June, in the year of our Lord one thousand eight hundred and twenty, and on divers other days and times, as well before as afterwards, was, and yet is, a common barrator; and that he the said C. D. on the said first day of June, and on divers other days and times, as well before as afterwards, in the county aforesaid, divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of the said Commonwealth, then and there did move, procure, stir up, and excite; to the evil example of all others in like cases to offend, and against the peace and dignity of the Commonwealth aforesaid.§ Wherefore &c.

* Hawk. b. 2, c. 25, s. 59.

† 4 Blac. Com. 134.

‡ Mass. Laws, stat. 1811, chap. 62.

§ Cr. Cir. Comp. 178.

*Against an Attorney, for suing a Person in the Name of one who was ignorant of the Suit, and had no Interest therein.**

A. B. of B., in the county of S., gentleman, on oath complains, that C. D. of in the county of gentleman, on the day of now last past, at B. aforesaid, in the county aforesaid, being then an attorney of the Court of Common Pleas for the said county of S., duly admitted, sworn, and authorized to practise as an attorney of said court, had in his custody and possession a certain promissory note of hand, bearing date &c. [*here insert a copy of the note, or the purport and substance of it, if not in the possession of the magistrate.*] And that he, the said C. D., did then and there, unlawfully and fraudulently, and with a design to injure and oppress one E. F., commence an action upon the aforesaid note of hand, to the Court of Common Pleas then next to be holden at A., within and for the county of K., on the Tuesday of in the year of our Lord one thousand eight hundred and against the said E. F., as the maker of said note, in the name of one G. H. of &c., without the knowledge or consent of him the said G. H., and without any power or authority from him therefor; he the said G. H. then and there having no interest, property, or concern in the said note, either as indorsee thereof, or in any other way or manner whatever; and that he the said C. D., the aforesaid action so as aforesaid unlawfully and fraudulently commenced, did unlawfully, fraudulently, and vexatiously prosecute to final judgment and execution, with intent him the said A. B. to injure, harass, and oppress; and also with intent unlawfully and oppressively to enhance and augment the cost to be taxed for the benefit of him the said C. D. in the aforesaid action and suit; in violation of his duty as an attorney of the aforesaid Court of Common Pleas, to the great injury, oppression, and impoverishment of the said A. B., and against the peace and dignity of the Commonwealth aforesaid.†

* 4 Bla. Com. 184.

† Judgment was rendered upon an indictment, from which this form is taken, in the Supreme Judicial Court of Massachusetts in the county of Suffolk.

The statute of 1811, chap. 62, before alluded to, prohibiting justices of the peace, and other officers &c. from buying promissory notes and other demands, for the purpose of making profit in the collection thereof, is framed in language so involved and ambiguous, that whenever application is made to a magistrate, for a process upon that statute, it will be advisable for him to refer the complainant to the attorney or solicitor general, for the form of his complaint. The statute, though consisting of but one section, is supposed to provide for the punishment of more than twenty distinct offences.

BASTARD.—See “Murder.”

The statute of this Commonwealth,* made to prevent the destroying and murdering of bastard children, provides for the punishment of three distinct offences; to wit, first, that of a woman's concealing her pregnancy, and being willingly delivered in secret of a child, which by law would be a bastard; secondly, for a woman's concealing the death of any such child; and thirdly, that of a woman who is guilty of the wilful murder of her infant bastard child. The form of a complaint, for this last offence, will be found under the head of Murder, where it more properly belongs, and where it has been usually placed in the books of English precedents.

*Form of a Complaint against a Woman, for concealing her
Pregnancy.*

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of spinster, on the day of now last past, at B. aforesaid, in the county aforesaid, being then and there pregnant with a [male] child, did then and there conceal her pregnancy; and was then and there willingly delivered in secret by herself of the said [male] child, the issue of her body; which child, by the laws of this Commonwealth, was a bastard; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Woman for concealing the Death of a Bastard Child.

A. B. of B., in the county of S., yeoman, on his oath complains, that C. D. of in the county of spinster, on the day of now last past, at B. aforesaid, in the county aforesaid, being then and there pregnant with a [male] child, did bring forth the said child, of the body of her the said C. D., and was then and there willingly delivered thereof, alone, and in secret by herself; which said child, so being born, and so being the issue of the body of her the said C. D., if it were born alive, was, by the laws of this Commonwealth, a bastard; and that she, the said C. D., did then and there endeavour, privately

* Mass. Laws, stat. 1784, chap. 44.

by herself, [*or by the procurement of one E. F., if such were the fact,*] to conceal the death of said bastard child, the said issue of her body, so that it might not come to light whether it were born alive or not, or whether it were murdered or not; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.*

The forms of proceedings upon our statute, for the maintenance of bastard children, will be found among the forms of a justice's records, ante, page 155. They not being strictly of the nature of a criminal prosecution, do not make a part of the forms of proceedings in such cases.

BEGGARS &c.—For forms of proceedings against them, see “House of Correction,” post.

BESTIALITY.—See “Sodomy.”

BIGAMY.—See “Polygamy.”†

BLASPHEMY.

All blasphemies against God, or the Christian Religion, or the Scriptures of the Old and New Testament, are indictable at common law, as well as upon the statute against blasphemy. So, it is said, are all impostors in religion, such as falsely pretend to extraordinary missions from God, or who terrify or abuse the people with false denunciations of judgments.‡ Perhaps the most appropriate and proper remedy for the latter evil, is the neglect and contempt with which these impostors ought always to be treated.

By a statute of 9 & 10 of William III. it was enacted, that if any person, professing the Christian religion, shall deny *any one* of the Persons of the Trinity to be God, or shall assert or maintain, that there are more God's *than one*, he shall be subjected

* The forms of these two Complaints are the same as have been adopted and used in indictments upon this statute, in the Supreme Court of this state.

† 4 Bla. Com. 163.—Polygamy is the most proper word.

‡ 1 East, P. C. 8; 1 Mass. Laws, 69.

to very severe punishment and disqualifications. The absurdity of such a statute provision could not be longer submitted to in the present state of religious toleration and improvement in theological science. Accordingly, as lately as the 53 Geo. III. this statute was repealed, *so far as it affects Unitarians*.*

By the statute of Massachusetts against blasphemy, above referred to, four species of that offence are contemplated and made punishable. 1. By wilfully blaspheming the holy name of God, by denying, cursing, or contumeliously reproaching, God, his creation, government, or final judgment of the world. 2. By cursing or reproaching Jesus Christ. 3. By cursing or reproaching the Holy Ghost; and 4. By cursing or contumeliously reproaching the holy Word of God, contained in the books of the Old and New Testaments; or by exposing them, or any part of them, to contempt and ridicule.†

Form of a Complaint for Blasphemy, by blaspheming the holy Name of God.

A. B. of B., in the county of S., yeoman, upon his oath complains against C. D. of in the county of yeoman, for that he, the said C. D., on the day of now last past, at B. aforesaid, in the county aforesaid, being a person of an immoral and irreligious mind and disposition, and intending the holy name of God to dishonor and blaspheme, did then and there wilfully commit the heinous crime of blasphemy, and did wilfully blaspheme the holy name of God, by denying, cursing, and contumeliously reproaching God, his creation, government, and final judging of the world; that is to say, that said C. D. then and there, in the presence and hearing of divers good and worthy citizens of the said Commonwealth, did wilfully and blasphemously speak, pronounce, utter, and publish these profane and blasphemous words following, to wit, [*here insert the words spoken and published, verbatim, and with proper inuendos, if the words require it;*] to the great dishonor of Almighty God, in manifest contempt of good government and true religion; against good morals and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Whereof &c. [*as ante*, p. 137.]

* 2 Chit. C. L. 14, note.

† Mass. Laws, stat. 1782, chap. 8.

For Blasphemy, by cursing and reproaching Jesus Christ.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of yeoman, being a person of a wicked, immoral, and irreligious mind and disposition, and contriving and intending the christian religion to dishonor, defame, and vilify, on the day of now last past, at B. aforesaid, in the county aforesaid, did wilfully commit the heinous crime of blasphemy, by wilfully cursing and reproaching Jesus Christ; that is to say, the said C. D. then and there, in the presence and hearing of divers good and worthy citizens of said Commonwealth, did wilfully, profanely, and blasphemously speak, pronounce, utter, and publish these profane and blasphemous words following, to wit, [*here insert the words spoken, verbatim, with proper inuendos, if the words require it;*] to the great dishonor of our Lord and Saviour Jesus Christ, and of his holy religion; in manifest contempt of good government, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*as ante*, p. 137.]

For Blasphemy, by cursing and reproaching the Holy Ghost.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of B. in the county of S., yeoman, being a person of an immoral and irreligious mind and disposition, and contriving and intending the christian religion to dishonor, revile, and bring into contempt and disrepute, on the day of now last past, at B. aforesaid, in the county aforesaid, did wilfully commit the heinous crime of blasphemy, by wilfully cursing and reproaching the Holy Ghost; that is to say, the said C. D. then and there, in the presence and hearing of divers good and worthy citizens of said Commonwealth, did wilfully, profanely, and blasphemously speak, pronounce, utter, and publish these profane and blasphemous words following; that is to say, [*here insert the words spoken verbatim, with proper unuendos, if the words require it;*] to the great dishonor of religion, good government, good morals, and good manners; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*as ante*, p. 137.]

For Blasphemy, by cursing and contumeliously reproaching the holy Scriptures.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, being a person of an immoral and irreligious mind, temper, and disposition, and contriving and intending the holy Word of God to bring into contempt, reproach, and ridicule, on the day of now last past, at B. aforesaid, in the county aforesaid, did commit the heinous crime of blasphemy, by wilfully cursing, and contumeliously reproaching the holy Word of God; that is, the canonical Scriptures, contained in the books of the Old and New Testaments, and by exposing them to contempt and ridicule; that is to say, the said C. D. then and there, in the presence and hearing of divers good and worthy citizens of the said Commonwealth, did wilfully, profanely, and blasphemously speak, pronounce, utter, and publish these profane and blasphemous words following, to wit, [*here insert the words spoken verbatim, with proper inuendos, if the words require it;*] to the great dishonor and manifest contempt of religion, good morals, and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*as ante*, p. 137.]*

BRIBERY.

BRIBERY is when a judge, or other person concerned in the administration of justice, takes an undue reward to influence his behaviour in his office. He that offers, as well as he that receives the bribe, is liable to be prosecuted. The offence has always been considered a most heinous as well as disgraceful one. In an early period of the English history, a chief justice was hanged for it. The laws both of Athens and Rome punished it in a severe and exemplary manner.†

* The four preceding complaints are drawn upon our statute against blasphemy, and are in the same form as those used in indictments for blasphemy in the Supreme Court of this state. There has been no prosecution in that court, for blasphemy at common law, within the last twenty years. But there have been several prosecutions and convictions upon the statute, within that period.

† 4 Bla. Com. 139; 3 Inst. 147.

A solicitation to commit a crime, though nothing be done in pursuance of it, is an indictable offence ; as an attempt, accompanied by an offer of money, to bribe an officer of the government, though it did not succeed.* An attempt to bribe at elections is criminal ; and so is a promise of money to a corporator, to vote for a member of the corporation.†

The act “ to prevent bribery and corruption,” passed under the provincial government of this state, A. D. 1758,‡ is the only existing statute which we have upon this subject. It has never been revised. It relates to but one species of bribery, viz. that of giving, or engaging to pay, and of accepting and receiving money, for the purpose of procuring offices of trust under the government. We have no statute for the punishment of bribery committed by civil magistrates, or judges ; but the offence is well known and clearly explained by the ancient common law. See also Constitution of Massachusetts, chapter 6, section 2, by which bribery is made a perpetual disqualification for office.

There are no precedents of indictments for bribery in the Crown Circuit Companion, or Tremain’s Pleas of the Crown ; and but one in the Crown Circuit Assistant ; and that is an Information in the famous case of attempting to bribe the Duke of Grafton. This precedent is transferred to Chitty’s Collection of Precedents of Indictments, Informations, &c. in his Crown Law. There are also, in this collection, several other precedents, for receiving bribes, founded upon recent English statutes. The following forms of complaints for this offence are original ; but have been drawn with as much care as possible, and the technical language of other precedents has been selected and used as far as it was applicable.

*Form of a Complaint against a Justice of the Common Pleas,
for accepting a Bribe.*

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D. of in the county of Esq., on the
day of now last past, at B. aforesaid, in the coun-

* 2 East, 5 ; 4 Burr. 2495. † Id. p. 2500.

‡ 2 Mass. Laws, 1039, Appendix.

ty aforesaid, was one of the justices of the Court of Common Pleas &c. [*state the style of the court,*] duly and legally appointed, qualified, and sworn to discharge and perform the duties of that office ; which, the said complainant alleges, is an office of great importance and trust concerning the administration of justice within this Commonwealth. And that he the said C. D., contriving and intending the duties of his said office, and the trust and confidence thereby reposed in him, to prostitute and betray, did then and there, unlawfully and corruptly accept and receive of one E. F. the sum of dollars, as a pecuniary reward to influence and induce him the said C. D. to [*here state the subject matters concerning which the bribe was received ;*] and that he, the said C. D., did thereby wilfully, unlawfully, and corruptly prostitute and betray, for the said pecuniary reward by him the said C. D., in his said office and station, in that behalf so as aforesaid accepted, taken, and received, the duties of his said office and the trust and confidence reposed in him therein ; to the great dishonor, scandal, and prostitution of the justice of said Commonwealth, and against the peace and dignity of the same. Wherefore &c.

For attempting to bribe a Justice of the Court of Common Pleas.

A. B. of B., in the county of C., upon his oath complains, that C. D. of in the county of Esq., on the day of now last past, at B. aforesaid, in the county aforesaid, was one of the justices of the Court of Common Pleas, [*state the style of the court,*] duly and legally appointed, qualified, and sworn to discharge and perform the duties of said office, which, the said complainant avers, is an office of great importance and trust within this Commonwealth ; and that E. F. of in the county of yeoman, on the same day of in the year aforesaid, at B. aforesaid, well knowing the premises, but unlawfully and corruptly devising and intending the said C. D. to seduce and corrupt, and to tempt him to prostitute and betray the duties of his said office and station, and the trust and confidence thereby reposed in him, did then and there unlawfully and corruptly propose and offer, and did cause and procure to be unlawfully and corruptly proposed and offered to be paid to the said C. D. a certain sum of money, to wit, the sum of dollars, as a pecuniary reward to induce and influence him the said C. D. to prostitute and betray the duties of his said office by [*here state the facts concerning which the bribe was offered ;*] to the great injury and dishonor of him the said C. D., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For bribing a Person to procure an Office of Trust ; on the provincial Statute of 1758.

A. B. of B., in the said county of S., Esq., upon his oath complains, that C. D. of &c., yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, did unlawfully and corruptly give and pay to one E. F. the sum of dollars, as a consideration and pecuniary reward, in order to induce him, the said E. F., to procure for him, the said C. D., the office of [*here state the name of the office ;*] the said office being then and there a place of trust within this Commonwealth ; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For corruptly accepting a Bribe, to procure an Office of Trust ; on the provincial Statute of 1758.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, did unlawfully and corruptly accept, take, and receive of one E. F. the sum of dollars, as a consideration and pecuniary reward for procuring, and unlawfully and corruptly undertaking to procure, for him the said E. F. the office of [*here state the name of the office ;*] the said office being then and there a place of trust within this Commonwealth ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

BURGLARY :

And other unlawful breaking and entering of buildings.

THE following preliminary remarks upon this offence are taken principally from the fourth volume of Blackstone's Commentaries. They contain a mere outline of the numerous cases, principles, and distinctions relative to the different branches of the crime of burglary, which are to be found in the books. It would

be incompatible with the object of this work to insert them more at large.

A burglar is "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony."* In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

The *time* must be by night; for in the day time there is no burglary. The law has settled what is to be reckoned night and what day, for this purpose. If there be daylight enough, either begun in the morning, or left in the evening, so as that the features of a man's face may be thereby discerned, it is no burglary. But this does not extend to moonlight; for the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of the night; "when all the creation, except beasts of prey, are at rest; and when sleep has disarmed the owner, and rendered his castle defenceless."† Both the breaking and the entry must be by night; for if the breaking were in the night, and the entry in the day, or *vice versa*, the offence would not amount to burglary.‡

The *place* must be in a *mansion-house*. For no other distant building is considered to be a man's castle of defence. The house must be a place of *residence*. For a house under repair, in which no one lives, though the owner's property is deposited there, is not a place in which a burglary can be committed. But the proprietor of the house need not be actually within it, at the time the offence is committed. For if he leaves it with his goods in it, and with an intention to return, though no person resides there in his absence, it will still be his mansion.§ Burglary may also be committed in a variety of buildings adjoining to, or making a part of dwelling-houses, and in separate apartments, occupied by lodgers. The reader is referred to the English writers upon crown law, for the cases and decisions upon this particular branch of the crime of burglary.

As to the *manner* of committing burglary; there must be both a *breaking* and *entry* to complete it.|| But they need not both

* 4 Bla. Com. 224.

† Id.

‡ 1 Hale, 551; 1 Leach, 185.

§ Fost. 77.

|| 4 Bla. Com. 226.

be done at the same time. For if a breach be made on one night, and the same breakers enter the next night through the same breach, they are burglars.* There must be an actual breaking. But this may be done by breaking, or taking out from, or opening a window ; or by lifting the latch of a door, or unloosing any other fastening that the owner has provided. If the thief descend through a chimney it is burglary. If admittance be obtained by fraud, as where the defendant met a servant who kept the key, and by false pretences enticed him to let her in, on which she robbed the house, it is burglary.†

An *entry* is requisite as well as breaking. The introduction of any part of the body will amount to an entry. As if the party breaks open a shop window, and with his hand takes out goods, the offence is complete.‡ Even the introduction of a hook, with intent to steal, may amount to burglary.§ There are several other acts which will amount to a burglarious entry, which are stated and explained in the books upon criminal law, to which the reader is referred.

The last ingredient, in this crime, is the *intent*. The breaking and entry must be with a *felonious intent*, otherwise it is only a trespass.|| And it is the same whether such intention be actually carried into execution or not. And therefore, when a house is burglariously broken and entered, with intent to commit a robbery, a murder, a rape, or any other felony, it is burglary, whether the thing be actually perpetrated or not.¶ The foregoing remarks apply to felonies created by statute, as well as those at common law ; because all the properties of a felony at common law are given to an offence when created by statute.**

The following forms, (except the first, which is at common law,) or precedents of complaints, for burglary &c. are drawn upon the statute of this Commonwealth.†† By the first section of this statute, no burglary is punished as a capital felony, unless the offender, at the time of committing the burglary, be armed with a dangerous weapon, or arm himself in the house with a danger-

* 1 Hale, 551.

† 2 East, P. C. 485.

‡ Fost. 107.

§ 3 Inst. 64.

|| 4 Bla. Com. 227.

¶ Id.

** 4 Bla. Com. 228 ; Hawk. b. 1, c. 88, s. 19.

†† Statute 1805, chapter 101.

For a Burglary, where the Prisoner armed himself with a dangerous Weapon, in the Dwelling-House : On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, about the hour of one in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of the said A. B. there situate, feloniously and burglariously did break and enter, with intent the goods, chattels, and moneys of him the said A. B., in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away ; he the said A. B. and divers others of his family being then and there lawfully therein ; and that he the said C. D., having then and there, in the dwelling-house aforesaid, armed himself with a certain dangerous weapon called a fire-shovel, ten linnen shirts, of the value of twenty dollars, and sundry pieces of silver coin, called Spanish milled dollars, to the amount and value of twenty dollars, of the moneys, goods, and chattels of him the said A. B., then and there in the dwelling-house aforesaid being found, then and there feloniously and burglariously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a Burglary, where the Prisoner committed an Assault, upon a Person lawfully in the House : On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, about the hour of eleven, in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of the said A. B. there situate, feloniously and burglariously did break and enter, with intent the goods and chattels of the said A. B., in the said dwelling-house then and there being, feloniously and burglariously to steal, take, and carry away ; he the said A. B. and divers others of his family being then and there lawfully therein ; and that he the said C. D. then and there, in and upon one E. F., who was then and there lawfully in the said dwelling-house, and in the peace of the said Commonwealth, feloniously and burglariously an actual assault did make, and him the said E. F. did then and there beat, wound, and abuse, and ten pieces of

gold coin, called Eagles, of the value of one hundred dollars, of the moneys of him the said A. B., then and there in the dwelling-house aforesaid being found, feloniously and burglariously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a Burglary against the Principal, and others present, aiding, assisting, &c. : On the First Section of the Statute.

[*Draw the complaint against the principal, conformably to the foregoing precedents, as the case may be, and then proceed as follows :*] And the said A. B. further complains, that E. F. of in the county aforesaid, laborer, at the time said burglary was committed, in manner and form aforesaid, to wit, on the said day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, was feloniously and burglariously present, aiding, assisting, and consenting in the felony and burglary aforesaid ; and aiding and assisting the said C. D. the felony and burglary aforesaid, in manner and form aforesaid, to do and commit ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a Burglary against the Principal, and Accessories before the Fact : On the First Section of the Statute.

[*Draw the complaint against the principal according to the foregoing precedents, as the case may require, and then proceed :*] And the said A. B., upon his oath aforesaid, further complains, that E. F. of in the said county of laborer, before the committing of the said felony and burglary, in manner and form aforesaid, to wit, on the day of in the year aforesaid, with force and arms at B. aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, and abet, counsel, hire, and command the said C. D. to do and commit the said felony and burglary, in manner and form aforesaid ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary to a Burglary, after the Fact : On the Third Section of the Statute.

[*Draw the complaint against the principal, conformable to the foregoing precedents, as the case may be, and then proceed as fol-*

lows:] And the said A. B. further complains, that E. F. of said B., laborer, afterwards, to wit, on the day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, well knowing the said C. D. to have done and committed the felony and burglary in form aforesaid, with force and arms, him the said C. D. then and there did knowingly harbor, conceal, maintain, and assist; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For entering a Dwelling-House in the Night Time, without breaking, with intent &c.: On the Fourth Section of the Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of him the said A. B., there situate, in the night time, to wit, about the hour of twelve, in the night of the same day, did enter, without breaking, with intent the goods and chattels of him the said A. B., in the dwelling-house aforesaid, then and there being, feloniously to steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

The last preceding form is to be adopted with only this alteration, that the words of the statute are to be adopted and used in such case, to wit, "the dwelling-house of the said A. B., there situate, *in the day time did break and enter.*"

* If there was a breaking of the dwelling-house in the *day time*, the complaints upon the second section of the statute, that is, for burglaries not capital, may be drawn according to the first of the foregoing forms for a burglary at common law; excepting only, that it must conclude, "contrary to the form of the statute in such case made and provided." The aggravations contained in the first section of the statute, which make the burglary capital, need not be *negatived* in a complaint on the second section; that is, you need not allege, in the latter case, that the defendant was *not* armed with a dangerous weapon, or that he did *not* commit an actual assault upon some person lawfully in the house, &c. If these aggravations, which make the burglary capital, are not alleged, the charge will be taken to be on the second section, and not for a capital burglary; and such has been the practice ever since the statute was enacted.

For breaking and entering a Ship or Vessel, in the Day Time, with Intent &c. : On the Fourth Section of the Statute.

A. B. of B., in the county of S., mariner, upon his oath complains, that C. D. of in the said county of laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain ship or vessel of him the said A. B., called the then and there lying and being, within the body of the said county of in the day time, did break and enter, with intent the goods, chattels, and moneys of him the said A. B., in the vessel aforesaid then and there being, feloniously to steal, take, and carry away ; against the peace of said Commonweath, and contrary to the form of the statute in such case made and provided. Wherefore &c. [*as ante*, p. 137.]*

BURNING.

Arson and other malicious Burning.

THE definition of Arson, at common law, is the malicious and wilful burning of the dwelling-house or out-houses of another man.† This definition is not strictly correct when applied to the crime of arson, as a capital offence, distinct from the other species of malicious burning, as created by the statute of this Commonwealth. By this statute, arson is where “any person shall wilfully and maliciously set fire to the dwelling-house of another, or to any out-building adjoining to such dwelling-house, or to any other building, and by the kindling of such fire, or by the burning of such other building, such dwelling-house shall be burnt in the night time.”‡

This is an offence of great malignity, not only as against the right of habitation, which is acquired by the law of nature, as

* The two preceding forms may be adopted in all the other cases, mentioned in the fourth section of the statute, by varying the allegation, as to the description of the building broken and entered, according to the fact and in the precise words of the statute.

† 4 Bla. Com. 220, chap. 116.

‡ Stat. 1804, chap. 181.

well as by the laws of society ; but because of the terror and confusion which necessarily attend it. It is always perpetrated from motives of the purest malice, and most diabolical revenge. In most of the other felonies, such as burglary, larceny, &c. the property to be acquired by the plunder, furnishes the fatal temptation to the wicked and deluded perpetrator ; but in this, nothing but destruction and devastation can follow the commission of the crime.

To constitute this crime, there must be a *burning* ; it must be *wilful*, and dictated by *malice* ; the place consumed must be a *dwelling-house* of another ; and the burning of such dwelling-house, by our statute, must be in the night time.

There must be an *actual burning*. But it is not necessary that the entire building should be set on fire, or that any part of it should be entirely consumed ; for if once a part of it is on fire, though it should go out, without any effort to extinguish it, the crime will be complete.* It must be *wilful and malicious*. The accidental burning, therefore, of the dwelling-house of another, though it occur in doing an unlawful act, is not arson.† But *malice* in this case does not merely imply a design to injure the party who is eventually the sufferer, but an evil and mischievous intention, however general. For if a man has a design to burn one house, and by accident the flames destroy another, he will be guilty of a malicious burning of the latter.‡

The place consumed must be the *dwelling-house of another*. No building, other than a dwelling-house, can by our statute be the subject of arson, as before explained. At common law, all the out-houses, that were part of the dwelling-house, or within its curtilage, were included in the definition of arson.§ There are a great variety of other buildings, the burning of which is made capital by English statutes.

It must be the dwelling-house *of another*. This refers as well to the lawful possession, as to the entire interest and legal title. The lawful possession confers a property while it exists. The offence of arson, (strictly so called,) may be committed by wil-

* 3 Inst. 66 ; 2 Chit. C. L. 1104. † 1 Hale, 569.

‡ Id. § 3 Inst. 67.

fully setting fire to a man's own house, provided his neighbour's house is thereby also burnt. And if a landlord set fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath, it will be accounted arson ; for during the lease, the house is the property of the tenant.*

The burning of the house must also be in the *night time*. By our statute no species of malicious burning is a capital offence, excepting that of burning a dwelling-house in the night time. The rules of law by which the question, what shall be deemed *night* for the purpose of completing this crime, are the same as have been herein before stated in the crime of burglary ; and may be found among the preliminary points of law relative to that offence.

Our statute, "providing for the punishment of incendiaries," relates to other malicious burnings below the degree of arson, or the burning of a dwelling-house in the night time ; with respect to many of which, the forms of complaints will be found immediately following those which are founded upon the first section of the statute. Strange as it may seem, another species of malicious mischief, totally distinct from that of malicious burning, *viz.* that of wilfully and maliciously *maiming and disfiguring cattle*, is thrown into the fourth section of this statute, providing for the punishment of incendiaries. But the forms of complaints upon this statute, for the latter offence, will be found under the head of "malicious mischief," which seems the most appropriate place for them.

Form of a Complaint for Arson: On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, about the hour of two in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of him the said A. B., there situate, feloniously, wilfully, and maliciously did set fire to, and the same house, then and there, by the kindling of such fire,

* 4 Bla. Com. 221, 222 ; Fost. 115.

did feloniously, wilfully, and maliciously burn and consume ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For setting Fire to a Building, whereby a Dwelling was burnt, in the Night Time : On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, about the hour of two in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, a certain building of one E. F., there situate, called a wood-house, feloniously, wilfully, and maliciously did set fire to, and that by the kindling of said fire, and by the burning of said wood-house, the dwelling-house of him the said A. B., there also situate, was then and there, in the night time, feloniously, wilfully, and maliciously burnt and consumed ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For maliciously setting Fire to a Building, adjoining a Dwelling-House, whereby a Dwelling-House was burnt : On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, about the hour of twelve in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, a certain out-building, called a wood-house, of the said A. B., there situate, and adjoining to the dwelling-house of him the said A. B., also there situate, feloniously, wilfully, and maliciously did set fire to ; and that by the kindling of said fire, the said dwelling-house of him the said A. B. was then and there, in the night time, feloniously, wilfully, and maliciously burnt and consumed ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For maliciously burning a Stable, within the Curtilage of a Dwelling-House : On the Second Section of the Statute.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, about the hour of ten

in the night of the same day, with force and arms, at B. aforesaid, in the county aforesaid, did wilfully and maliciously set fire to a certain stable of him the said A. B., then and there situate, and being within the curtilage of the dwelling-house of him the said A. B., there also situate, and that by the kindling of such fire, the aforesaid stable, situate and being within the curtilage of said dwelling-house as aforesaid, was then and there, in the night time, wilfully and maliciously burnt and consumed; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

For burning a Dwelling-House in the Day Time : On the Second Section of the Statute.

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of him the said A. B., there situate, in the day time, did wilfully and maliciously set fire to and burn; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

[If the fire was set to an out-building adjoining the dwelling-house, or to any other building, whereby the dwelling-house was burnt, the allegation in the complaints upon this section will be conformable to the facts in the case; and set forth as in the precedents, *ante*, for arson, on the first section of the statute.]

For maliciously burning a Meeting-House, in the Day Time : On the Third Section of the Statute.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain meeting-house

* The same form as the preceding may be adopted for the malicious burning, in the night time, of any other building mentioned in the latter part of the second section of the statute, describing the building in the identical words made use of in the statute. If a public building, set forth the public use for which it is designed, as follows, *viz.* "a certain meeting-house there situate, belonging to the first parish in the said town of B., and erected for public uses, to wit, for the public worship of God." And so of any other buildings erected for public use, as school-houses, court-houses, academies, &c.

there situate, belonging to the first parish in the said town of B., and erected for public uses, to wit, for the public worship of God, did then and there, in the day time, wilfully and maliciously set fire to, burn, and consume ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For maliciously burning a Vessel lying within the Body of the County : On the Third Section of the Statute.

A. B. of B., in the county aforesaid, mariner, upon his oath complains, that C. D. of B., in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain vessel called the the property of him the said A. B. and of E. F., G. H., &c. then and there lying and being within the body of the said county of did wilfully and maliciously set fire to, burn, and consume ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

For harboring and concealing an Offender in any of the foregoing Felonies or Offences : On the Fifth Section of the Statute.

[*Draw the complaint against the principal, according to the foregoing precedents, as the case may require, and then proceed :*] And the said A. B. further complains, that E. F. of in the county of laborer, afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, well knowing the said C. D. to have done and committed the felony and offence aforesaid, in manner and form aforesaid, did him the said C. D. then and there knowingly harbor, conceal, maintain, assist, and relieve, after the felony and offence aforesaid was done and committed in manner aforesaid, by him the said C. D. ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* The same form as the preceding may be adopted in all the cases mentioned in the fourth section of the statute, without any other alteration than what may be required in the description of the article or property burnt ; the words of the statute, creating the offence, viz. " that if any person shall wilfully and maliciously burn," &c. being the same in all the sections excepting the first ; which latter relates to the capital offence of Arson.

CHEATS.

CHEATS are offences either at common law, or by statute. Cheats at common law are defined by Hawkins to be "deceitful practices in defrauding, or *endeavouring* to defraud, another of his known right, by means of some artful device, contrary to the plain rules of common honesty."* Mr. East is not satisfied with the correctness of this definition. His definition is, "that it consists in the fraudulent obtaining of the property of another by any deceitful and illegal practice or token, (short of felony,) which affects or may affect the public."†

Cheats at common law relate to some matter of a *public* concern, or in regard to *private* concerns, such as are affected by conspiracy, or false tokens, calculated in their nature to deceive the public in general; as selling by false weights and measures; selling cloth marked with a counterfeit measurer's seal; or other known general mark in the trade; playing with false dice; doing judicial acts in the name of others, &c.; *private* cheats are also, in some cases, punishable at common law; as the pretending to be, and obtaining credit as a merchant, by means of forged letters and commissions.‡

Cheats, punishable by statute, are made so by statute of 33 H. VIII. c. 1, which relates to the falsely and deceitfully obtaining money, goods, or other things, by color and means of any *privy token*, or *counterfeit letter* in other men's names. This statute has always been adopted and considered as a part of the law of this Commonwealth; and prosecutions have been constantly maintained upon it.§ As to what is a false *privy token* within this statute, it has generally been taken to denote some real, visible mark or thing, as a key, &c. A mere false affirmation or assertion is not such.||

In furtherance of the provisions of the statute of 33 H. VIII., it was further enacted by statute of 30 Geo. II., that all persons who

* Hawk. b. 1, c. 71, s. 1.

† 2 East, P. C. c. 18, s. 2.

‡ 2 East, P. C. c. 18, s. 6.

§ 6 M. R. p. 72, Commonwealth v. Warren.

|| 2 East, P. C. c. 18, s. 7.

knowingly, by *false pretence* or *pretences*, shall obtain goods &c. with intent to cheat any person of the same, shall be deemed offenders against law and the public peace, and punished accordingly. This statute has never been adopted, or considered in force in this state ;* and therefore, unless the frauds, intended to be punished by it, were committed by more than one person, so as to amount to a fraudulent conspiracy at common law, no indictment in this state could have been supported for such frauds. To remedy this evil, the statute of this Commonwealth† “for the suppression and punishment of cheats,” was passed. This statute was passed February 7, A. D. 1816, and the first section is a transcript of the statute of 30 Geo. II., and is in precisely the same language. The wisdom of our legislature, in adopting the language of the English statute, is apparent ; as we now have the benefit of all the judicial constructions and expositions of it, by the English judges.

The term “*false pretences*,” used in this statute, is of great latitude ; and was used to protect the weaker part of mankind ; because all were not equally prudent ; and has been considered to extend to every case, where a party had obtained property by falsely representing himself to be in a situation in which he was not ; or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit.‡

Form of a Complaint, at Common Law, for selling by false Weights and Measures.§

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of trader, on the day of and from thence until the day of the exhibiting of this complaint, did use and exercise the trade and business of a shopkeeper, and during that time did deal in the buying and selling by weight, of divers goods, wares, and merchandises, at B. aforesaid. And that the said C. D., being a person of a wicked and depraved mind, and contriving and fraudulently intending, the citizens of said Commonwealth to cheat and defraud, during the time he exercised his said trade and business, on the

* 6 M. R. 72, *Commonwealth v. Warren*. † Stat. 1815, chap. 136.

‡ Per Lord Kenyon in *Rex v. Young and others* ; 3 T. R. 98 ; See also 2 East P. C. c. 18, s. 8. § 2 Chit. C. L. 1001.

day of and on divers other days and times between that day and the day of the exhibiting of this complaint, at B. aforesaid, in the county aforesaid, did knowingly, willfully, and publicly, keep in a certain shop there, wherein the said A. B. did so as aforesaid carry on his said trade, a certain pair of false scales, for the weighing of goods, wares, and merchandises, by him sold in the way of his said trade; which said scales were then and there, by artful and deceitful ways and means, so made and constructed, as to cause the goods, wares, and merchandises, weighed therein and sold thereby, to appear of greater weight than the real and true weight, by one eighth part of such apparent weight; and that he the said C. D. on the day of aforesaid, at B. aforesaid, did knowingly, willingly, and fraudulently sell and utter to one E. F., in the way of his said trade, a quantity of flour, weighed in and by the said false scales, as and for fifty pounds weight of flour; whereas in truth and in fact the weight of said flour, sold as aforesaid, was short and deficient of the said weight of fifty pounds, by one eighth part of the said weight of fifty pounds; he the said C. D. then and there well knowing the said scales to be false as aforesaid; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For defrauding a Person, by Means of a counterfeit Letter, and other false Tokens : On the Statute of 33 H. VIII, c. 1.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, being an evil disposed person, and devising and endeavouring unlawfully to obtain and get into his hands and possession the property of the honest and industrious citizens of this Commonwealth, for the maintenance of his dishonest and profligate living, on the day of at B. aforesaid, in the county aforesaid, falsely and deceitfully did pretend and affirm to him the said A. B., that his the said C. D.'s name was E. H., and that he was the son of one G. H. &c.; and that the said C. D. a certain false and counterfeit letter, in the name of him the said G. H., as a true and genuine letter of him the said G. H., falsely and fraudulently to him the said A. B. then and there did deliver, (the said G. H. being then and long before, the friend and intimate acquaintance of him the said A. B.), by which said false and counterfeit letter it was mentioned that the said G. H. desired the said A. B. to supply the bearer thereof, Mr. C. D., with the sum of sixty dollars, and place the same to his account, (meaning the account of him the said G. H.;) and that the said A. B., then and there believing the said false and counterfeit letter to be

the proper handwriting of him the said G. H., did then and there pay and deliver to the said C. D. the said sum of sixty dollars; whereas in truth and in fact, the said G. H. never did write or send, or cause to be written or sent, any such letter to him the said A. B., desiring him to pay the said C. D. any sum of money whatever. By means of all which the said C. D., by color of the said counterfeit letter, and by the said false tokens and pretences, unlawfully, falsely, fraudulently, and deceitfully did obtain and get into his hands and possession, of and from him the said A. B., the said sum of sixty dollars; and the said A. B., of the said sum of sixty dollars, in manner and form aforesaid, then and there fraudulently and deceitfully did deceive, cheat, and defraud; to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

*For obtaining Goods of a Shopkeeper, under Pretence of being
Servant to a Customer: On the late Statute for the Suppres-
sion and Punishment of Cheats.†*

A. B. of B., in the county of S., shopkeeper, upon his oath complains, that C. D. of in the county aforesaid, laborer, being an evil disposed person and a common cheat, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud the said A. B. of his goods, wares, and merchandises, for the support of his profligate way of life, on the day of at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to the said A. B., that he the said C. D. then was the servant of E. F., (the said E. F. then and long before being well known to him the said A. B., and a customer of him the said A. B., in his said business and way of trade,) and that he the said C. D. was then sent by the said E. F. to the said A. B. for five yards of superfine woollen cloth; by which said false pretences, the said C. D. did then and there unlawfully, knowingly, and designedly obtain from the said A. B. five yards of superfine woollen cloth, of the value of fifty dollars, of the goods, wares, and merchandises of him the said A. B., with intent him the said A. B. then and there

* This complaint concludes, as at common law, and not contrary to the form of the statute, upon the authority of the decision in the case of *Commonwealth v. Warren*, 6 M. R. p. 72, where it is said that the statute of 83 H. VIII. has been adopted in this state, "as a part of the common law." Per Parsons C. J. *Quære*—would not such a letter be an order for the payment of money, within the statute against forgery, and indictable as a forgery of such an order?

† Stat. 1815, chap. 186.

to cheat and defraud of the same ; whereas in truth and in fact, the said C. D. was not then the servant of the said E. F., and was not then, or ever hath been, sent by the said E. F. to the said A. B. for the said cloth, or for any cloth whatever ; to the great damage and deception of the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute, in such case made and provided. Wherefore &c.

*For obtaining Goods under false Pretences of being Merchants of good Fortune : On the late Statute for the Suppression &c. of Cheats.**

A. B. of B., in the county of S., merchant, upon his oath complains, that C. D. and E. F. of in the county aforesaid, laborers, contriving and intending unlawfully, fraudulently, designedly, and deceitfully to cheat and defraud him the said A. B. of his goods and merchandises, for the support of their dishonest and profligate way of life, on the day of at B. aforesaid, in the county aforesaid, did falsely, unlawfully, knowingly and designedly pretend to the said A. B., that the said C. D. then was a merchant of great property, who wanted to purchase horses, in order to export and send them abroad, and that he was then a housekeeper at in the county of whereas in truth and in fact, the said C. D. was not then a merchant of great property, who wanted to purchase horses to be exported and sent abroad, nor was he then a housekeeper at aforesaid, as they the said C. D. and E. F. did then and there falsely pretend to the said A. B., and that the said C. D. and E. F., by the false pretences aforesaid, did then and there unlawfully, knowingly, and designedly obtain from the said A. B. one mare and six geldings of him the said A. B., of the price and value of five hundred dollars, with intent then and there to cheat and defraud him the said A. B. of the same ; to the great damage of him the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.†

* Stat. 1815, chap. 136.

† This form would be good, if the allegation, that the horses were wanted for exportation, were wholly omitted.—2 Chit. C. L. 1006, 1007.—Note also that the facts set forth in this complaint would amount to a fraudulent conspiracy at common law, and might be prosecuted as such.

For obtaining Money under false Pretences of drawing upon a Person who, the Prisoner pretended, was indebted to him, and was a Person of Property: On the late Statute for the Suppression of Cheats.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, being an evil disposed person, and a common cheat, and contriving and intending unlawfully, fraudulently, designedly, and deceitfully to cheat and defraud the said A. B. of his moneys, for the support of his profligate way of life, on the day of at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to the said A. B., that one E. F. was a gentleman of property, residing at in the county of and that the said E. F. would accept and pay a certain bill of exchange in writing, then and there drawn by the said C. D. upon the said E. F., and dated the day and year last aforesaid, and whereby the said C. D. required the said E. F. to pay to him the said A. B., or order, the sum of one hundred dollars, in six days after date thereof, and to place the same to account of him the said C. D., and then and there delivered the same to the said A. B.; by which said false pretence, the said C. D. did afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, unlawfully, knowingly, and designedly obtain from the said A. B. the said sum of one hundred dollars, of the money of him the said A. B., with intent then and there to defraud him of the same; whereas in truth and in fact, the said E. F. was not then a gentleman of property, residing at in the county of , and whereas in truth and in fact the said E. F. was then and there a pauper, chargeable to, and maintained by the town of , and whereas in truth and in fact, the said E. F. did not and could not, nor would pay the said bill of exchange, or any part of the money therein mentioned, but was then wholly insolvent and unable to pay the same, which the said C. D. then and there well knew; to the great damage of him the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

COMPOUNDING A FELONY.

THE offence of compounding a felony has always been highly penal; and consists in receiving again, goods that have been stolen, in cases of robbery or larceny; or in that, or any other case, taking a reward not to prosecute. It was formerly holden to constitute the party thus offending, an accessory to the original crime.* At this day, it is a high misprision and obstruction of public justice, punishable by fine and imprisonment.† But the mere retaking of goods stolen, when found by the lawful owner, is no offence, unless some understanding exist, that the offender shall not be prosecuted.‡

Compounding prosecutions upon penal statutes is an offence of an equivalent nature, in *criminal* cases, to that of champerty, in civil suits, and is besides an additional misdemeanor against public justice, by contributing to make the laws odious to the people. It is severely punished by a statute of 18 Elizabeth, by fine, pillory, and personal disqualifications.§

Form of a Complaint for compounding a Felony.

A. B. of B., in the county of yeoman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, came before E. F. Esq., then and yet being one of the justices of the peace in and for said county of S., duly and legally authorized and qualified to execute and perform the duties of said office, and then and there upon his oath did charge, accuse, and complain against one G. H. for feloniously stealing, taking, and carrying away one silver spoon and two silk handkerchiefs, of the goods and chattels of the said C. D.; upon which accusation and complaint, the said E. F. Esq., then and there issued his warrant under his hand and seal, in due form of law, for the apprehending and taking of the said G. H. to answer to, and be examined and dealt with concerning the felony aforesaid, so as aforesaid charged upon him, as to law and justice might appertain; and the said A. B. further complains, that afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, the said G. H. was arrested and taken by

* 4 Bla. Com. 134. † 1 Hale, 546, 619. ‡ Id. § 4 Bla. Com. 135.

virtue of the said warrant for the felony aforesaid, and was then and there brought before the said E. F. Esq., the justice aforesaid, and was then and there examined by the said justice, of and concerning the felony aforesaid, and the subject of said complaint was examined into and heard by said justice; upon which said examination and hearing, the said E. F. Esq., made a certain warrant, under his hand and seal, and in due form of law directed to the keeper of the Commonwealth's gaol in said B., or to his under keeper or deputy, [*here set forth the warrant of commitment.*] And the said A. B. further complains, that the said C. D., well knowing the premises, but contriving and intending unlawfully and unjustly to prevent the due course of justice and law in this behalf, and to cause and procure the said G. H., for the felony aforesaid, to escape with impunity, afterwards, to wit, on the day of at B. aforesaid, in the county aforesaid, unlawfully, and for the sake of wicked gain, did take upon himself to compound the said felony on behalf of the said G. H., and then and there did exact, receive, and have of the said G. H. the sum of dollars, for and as a reward for compounding the said felony, and desisting from all further prosecution against the said G. H. for the same; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For compounding an Offence against a penal Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, heretofore, to wit, on the day of prosecuted out of the Court of Common Pleas &c. [*state the style of the court, and for what county it was to be holden,*] a certain writ against one E. F., directed to the sheriff of [*here recite the writ;*] and the said A. B., upon his oath aforesaid, further complains, that the said writ, so sued out as aforesaid by the said C. D. against the said E. F., was by him sued out with intent to declare against the said E. F. in the same court, in a plea of debt, for a certain penalty, supposed to have been incurred by the said E. F. by reason of his the said E. F. having before that time [*here insert the facts upon which the penalty is supposed to have been incurred; which may be taken from the declaration in the writ before recited,*] against the form of the statute in such case made and provided. And the said A. B., upon his oath aforesaid, further complains, that the said C. D., being a person of evil disposed mind, and not regarding the statute in that case made and provided, on the day of at B. aforesaid, in the county aforesaid, unlawfully, and for the sake of wicked

gain, did take upon himself to compound and agree with the said E. F. for the said offence, without the order or consent of the said court, out of which the said writ was sued out as aforesaid; and then and there did exact, receive, and have of and from the said E. F. the sum of fifty dollars, as and for a reward for compounding with the said E. F. for the said offence, and desisting from further prosecuting his said suit; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.*

CHALLENGES TO FIGHT.—See “Duelling.”

CHAMPERTY.—See “Maintenance.”

COHABITATION, UNLAWFUL, &c.—See “Lewdness.”

COIN.—See “Forgery and Counterfeiting.”

CONCEALMENT OF PREGNANCY.—See “Bastard.”

COUNTERFEITING.—See “Forgery and Counterfeiting.”

CONSPIRACY.

THE ancient writers upon criminal law, disagree in their definitions of the crime of conspiracy. The definitions of Coke, Hawkins, and Blackstone, are too narrow for the construction of this offence at the present day. The definition of Lord Coke is; “a consultation and agreement between two or more, to appeal or indict an innocent person, falsely and maliciously, whom, accordingly, they cause to be indicted or appealed; and afterwards the party is lawfully acquitted by the verdict of twelve men.”† The accuracy of the last clause of this definition is questioned by Hawkins, who maintains that an acquittal, by a jury, of the party indicted is not necessary to constitute the offence.‡ The definition of Blackstone conforms in substance to

* This offence is created by statute 18 Eliz. But it is presumed it is also an offence at common law in this country, and may be prosecuted as such here.

† 3 Inst. 143.

‡ Hawk. b. 1, c. 72, s. 2.

of the offence,) and the general object for which the conspiracy was entered into, and intended to be fraudulently accomplished. It is apprehended that this mode of setting out the offence will be legal and valid in a complaint, upon which the party is to be arrested and bound over to be further accused and tried by indictment; probably, from the cases and authorities before referred to, such a mode of charging the offence would be deemed sufficient, even in an indictment. If, however, the public prosecutor shall think it proper to be more minute or particular in his indictment, he will have an opportunity of pursuing his own course, in the court to which the party is bound over or committed for trial.

Form of a Complaint for a Conspiracy to charge a Man with a Rape, with Intent to obtain Money from him.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, and E. F. his wife, and G. H. of said B., laborer, being evil disposed persons, and devising and intending unjustly, wickedly, and maliciously to deprive him the said A. B. of his good name, credit, and reputation, and also to subject him the said A. B., without any just cause, to the loss of his life, on the day of with force and arms, at B. aforesaid, in the county aforesaid, falsely, unlawfully, wickedly, and maliciously did conspire, combine, confederate, and agree together, to charge and accuse him the said A. B. that he had then lately before feloniously ravished and carnally known the said E. F. by force and against her will; with intent unjustly to obtain and acquire to them the said C. D., E. F., and G. H., of and from him the said A. B. divers sums of money for compounding the said pretended felony and rape, so falsely, wickedly, and maliciously charged on him as aforesaid; to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Conspiracy to charge a Man with receiving stolen Goods, knowing them to be stolen, and obtaining Money for compounding the same.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D., E. F., and G. H., all of in the

county aforesaid, laborers, being evil disposed persons, and wickedly devising and intending the said A. B. unjustly to deprive of his credit and good name, and also fraudulently to obtain and acquire to themselves of and from the said A. B. divers large sums of money, on the day of with force and arms, at B. aforesaid, in the county aforesaid, did wickedly, fraudulently, and maliciously conspire, combine, confederate, and agree among themselves, falsely to charge and accuse the said A. B. that he had then lately before received certain goods which had then been lately before feloniously stolen, taken, and carried away, knowing them to be stolen ; and that they the said C. D., E. F., and G. H., by divers threats, menaces, and allegations of them the said C. D., E. F., and G. H., made and uttered in pursuance of the said conspiracy, combination, confederacy, and agreement aforesaid, that the said A. B. should be prosecuted and punished as a receiver of stolen goods, knowing them to be stolen, afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, did demand, receive, and take the sum of fifty dollars, of him the said A. B., for and as a composition of, and agreement not to prosecute the same pretended offence, and to discharge him the said A. B. from all further prosecution for the same ; to the great damage of him the said A. B., and against the peace and dignity of the said Commonwealth. Wherefore &c.

For a Conspiracy among Workmen, to raise their Wages and lessen the Time of Labor.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D., E. F., and G. H., all of in the county of laborers, on the day of now last past, at B. aforesaid, in the county aforesaid, being all workmen and journeymen in the art, mystery, and manual occupation of a wheelwright, not being content to work and labor in that art and occupation by the usual number of hours, and at the usual rates and prices for which they and other journeymen and workmen were accustomed to work and labor, but falsely and fraudulently conspiring and combining, unjustly and oppressively to increase and augment the wages of themselves and others, workmen and journeymen in the said art and occupation, and unjustly to extort and exact great sums of money for their labor and hire in the said art, mystery, and occupation, from their masters and employers therein, unlawfully did assemble and meet together, and so being assembled and met, did then and there unjustly and fraudulently conspire, combine, confederate, and agree among

themselves, that none of the said conspirators, after the said day of would or should work at any lower rate than two dollars for the hewing of every hundred of spokes for wheels ; and three dollars for the making of every pair of hinder wheels, for or on account of any master or employer whatsoever, in the art, mystery, and occupation aforesaid ; and also that none of said conspirators would work day work, or labor any longer than from the hour of six in the morning to the hour of six in the evening, in each day from thenceforth ; to the great damage and oppression, not only of their masters and employers in the said art and occupation, but also of divers other good citizens of said Commonwealth, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Conspiracy to charge a Man with being the Father of a Bastard Child.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D., E. F., and G. H., being persons of evil fame and profligate course of life, on the day of now last past, at B. aforesaid, in the county aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, the good name, fame, and reputation of him the said A. B., without any just cause, to injure, stain, and destroy, and falsely and maliciously, and, for the sake of wicked and unjust gain, to charge the said A. B. with the crime of adultery, and to bring the said A. B. into hatred and reproach, and also to obtain and extort from the said A. B. divers large sums of money by unlawful ways and means ; and that they the said C. D., E. F., and G. H., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, unlawfully and maliciously, and for the sake of wicked and unlawful gain, in the hearing of divers citizens of said Commonwealth, did charge and accuse the said A. B., that he the said A. B. then lately before had carnal knowledge of the body of I. J., and was the reputed father of a certain illegitimate child born of the body of her the said I. J. ; to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Conspiracy to engross and monopolize the Article of Vitriol.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D., E. F., and G. H., on the day of now last past, and for a long time before and after, at B. aforesaid, being each of them common buyers and sellers of a certain article called vitriol, they the said C. D., E. F., and G. H., did then and there falsely and fraudulently conspire, combine, confederate, and agree together, for their private gain, to acquire, obtain, and engross into their hands and possession all the vitriol made and manufactured, or then afterwards to be made and manufactured, in and about the town of B. aforesaid, to make a monopoly thereof, and to make and enhance, at their will and pleasure, the price of such vitriol, the same being a commodity necessary and requisite for the dying of cloth, and for other necessary uses among the people of said Commonwealth; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For a Conspiracy to cheat a Man of his Goods, under Pretence of buying them.**

A. B. of B., in the county aforesaid, merchant, upon his oath complains, that C. D., E. F., and G. H., being persons of evil fame and dishonest conversation, and devising and contriving to obtain and acquire the goods and property of the citizens of this Commonwealth, by unlawful and fraudulent means, pretences, and devices, on the day of now last past, at B. aforesaid, in the county aforesaid, did falsely conspire, combine, confederate, and agree among themselves, unlawfully and fraudulently to obtain, acquire, and get to themselves the goods, wares, and merchandise of the said A. B., under color and pretence of buying the same; to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Conspiracy to make an unlawful and oppressive Tax.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D., E. F., and G. H., all of B. aforesaid, in the county aforesaid, yeomen, they the said C. D., E. F., and G. H., having then lately before been legally chosen assessors of the

* 1 Trem. P. C. 91, Rex. v. Wilcox.

said town of B., for the year aforesaid, and having each of them accepted the said office, and having each of them severally qualified himself according to law, to discharge and perform the duties of said office, on the day of in the year aforesaid, at B. aforesaid, did unlawfully, falsely, and corruptly conspire, combine, confederate, and agree among themselves, by virtue and color of their said offices, to make an unlawful, unequal, and oppressive tax or assessment, upon the inhabitants of the said town of B. ; and that they the said C. D., E. F., and G. H., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, did then and there falsely, unlawfully, and corruptly, by virtue and color of their said offices, proceed to make and publish a certain unlawful, unequal, and oppressive tax or assessment, called the ministerial tax, upon the inhabitants of said town of B., and signed the same with their hands, in their capacity of assessors as aforesaid of the said town of B., with intent certain of the inhabitants of the said town of B. to injure, defraud, and oppress ; against the peace and dignity of the Commonwealth aforesaid. Wheretore &c.

For a Conspiracy to defraud an illiterate Person of an Estate, by falsely reading to him a Deed of Bargain and Sale, as and for a Bond of Indemnity.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D., E. F., and G. H., all of being evil disposed persons, and wickedly devising and intending the said A. B. to injure, deceive, and defraud, and him the said A. B. fraudulently to deprive of his property and estates, on the day of now last past, at B. aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, falsely and fraudulently to obtain from the said A. B. a deed of bargain, and sale of a certain lot of land in said town of B., called Lot No. 20 in said town, [*here describe the land ;*] and that, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement, so as aforesaid had, they the said C. D., E. F., and G. H., did falsely and fraudulently make out and fabricate a deed of bargain and sale of the said lot of land, to be signed and executed by him the said A. B., and did then and there falsely and fraudulently present the same to him the said A. B., and did then and there falsely and fraudulently read the same to him the said A. B. as a bond and obligation for the sum of seventy dollars, to be given by him the said A. B. to one I. J., as a consideration that he the said A. B. should indemnify the

said I. J. against the payment of certain notes of hand which he the said A. B. had, before the day aforesaid, made and given to one K. L., he the said A. B. being then and there an illiterate person, and by reason thereof wholly unable to read the deed, so as aforesaid falsely made out and presented to him; to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

For a Conspiracy to obtain Goods upon Credit, and then to abscond, and defraud the Vendor thereof.

A. B. of B., in the county aforesaid, on his oath complains, that C. D., E. F., and G. H. of &c., being evil disposed persons, and unjustly devising and intending one I. J. to defraud and cheat of his goods and merchandises, on at did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree among themselves, to obtain, acquire, and get into their hands and possession, of and from the said I. J., his goods and merchandises upon trust and credit, and then to abscond out of the Commonwealth, and defraud him thereof; and that the said C. D., E. F., and G. H., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement, so as aforesaid had among themselves, then and there falsely, fraudulently, and deceitfully did pretend to the said I. J., that they were about to open a retail grocery shop in the said town of B. for the vending and disposing of sundry goods, wares, and merchandises in that way of business and trade for one year next following the said day of and that they had actually rented and hired a shop in said town of B. for that purpose; and the said A. B. further complains, that he, giving credit to the false, fraudulent, and deceitful pretences and representations of the said C. D., E. F., and G. H., was then and there induced to, and did furnish and deliver to them sundry goods, wares, and merchandise, of the value of five hundred dollars, upon trust and credit; whereas in truth and in fact the said C. D., E. F., and G. H., never intended to open a retail grocery shop in said B. for the purposes aforesaid, but were then and there idle, dissolute, and vagrant persons, and wholly unable to pay the said A. B. for his said goods, wares, and merchandise, or any part thereof, and actually did defraud him thereof; to the great damage of him

* This form is abstracted from an indictment, tried in the Supreme Judicial Court of this state for the county of Kennebec. The original indictment stated the manner in which this fraud was completed and carried into execution; but that is not necessary.

the said A. B., and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

For a Conspiracy to manufacture spurious Indigo, with a fraudulent Intention to sell the same, as and for genuine Indigo of the best Quality.†

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D., E. F., and G. H., all of in the county of laborers, being evil disposed persons, not content to obtain their livelihood by honest means, but contriving and fraudulently intending to acquire and get into their hands and possession the moneys, goods, and property of the citizens of this Commonwealth, by fraudulent and dishonest means, on the day of at B. aforesaid, in the county aforesaid, did unlawfully and fraudulently conspire, combine, confederate, and agree among themselves, to mix, compound, and manufacture certain articles and materials hereafter mentioned, in the form and color, and of the resemblance of good and genuine indigo of the best quality, and of foreign growth and manufacture, with the fraudulent intent and design, that the base material to be mixed, compounded, and manufactured as aforesaid, should be exposed to sale, and that the same should in fact be sold at public auction, as and for good and genuine indigo of the best quality, and of foreign growth and manufacture; and the said A. B. further complains, that the said C. D., E. F., and G. H., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, on the day and year last aforesaid, at B. aforesaid, did mix and compound with a certain quantity of genuine indigo, of foreign growth and manufacture, certain other articles and materials, to wit, starch, blue vitriol, nut galls, alum, and a decoction of logwood, in such quantities and proportions as thereby to increase the quantity of the aforesaid genuine indigo, when mixed and compounded as aforesaid, to three times the quantity and number of pounds weight thereof; and having so mixed and compounded the same, did then and there so manufacture and work up the same, and the base materials and composition aforesaid, as to give the same the false appearance and resemblance of good and genuine indigo of the best quality, and of foreign growth and manufacture, with the fraudulent intent and purpose, that the same should be sold at public auction as and for good and genuine in-

* 1 Mass. Rep. 473, *Commonwealth v. Ward & al.*

† 2 Mass. Rep. 329, *Commonwealth v. Judd & al.*

digo of the best quality, and of foreign growth and manufacture, and with the fraudulent intent and purpose, that the purchaser or purchasers thereof should be cheated and defrauded ; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.*

For a Conspiracy, by Persons confined in Prison, to effect their own Escape, and that of others.

A. B. of B., in the county of Esq., upon his oath complains, that C. D., E. F., and G. H., on the day of at B. aforesaid, were persons lawfully confined in the Commonwealth's prison, situate in B. aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by virtue of divers legal processes then and there in force against them the said C. D., E. F., and G. H. ; and that the said C. D., E. F., and G. H., being persons of dangerous and wicked dispositions, and unlawfully contriving and intending as much as in them lay, to effect the escape of themselves, and of divers other persons, then and there prisoners lawfully confined in the said prison, and in the custody of the said keeper thereof, from and out of said prison, with force and arms, did then and there conspire, combine, confederate; and agree among themselves, unlawfully to effect the escape of themselves, the said C. D., E. F., and G. H., and the said other prisoners, then so lawfully confined in said prison, from and out of the same ; against the peace and dignity of the Commonwealth aforesaid.† Wherefore &c.

[The same form may be used, when the design of the conspirators is to effect their own escape only, and not that of others, by omitting the allegation "of divers persons, then and there prisoners, lawfully in the said prison."]

* It will be perceived that the latter part of the indictment, from which this precedent is taken, alleging the actual sale of the spurious indigo, is left out, which is conformable to the decision of the court in that case. The counsel for the defendant in that case, and the Chief Justice, in delivering the opinion of the court, speak of the *different counts* in the indictment. The fact is, that there was but one count in that indictment ; and when the second and third *counts* are referred to, it can mean only the different allegations in the body of the indictment, introduced, as usual, by the words, "And the jurors aforesaid, upon their oath aforesaid, do further present," &c.

† 2 Chit. C. L. 1149.

For a Conspiracy, by Prisoners, to effect their Escape, and breaking down Part of the Wall of the Prison.

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D., E. F., and G. H., all of laborers, at the time next hereafter mentioned, were prisoners lawfully confined in the Commonwealth's prison, situate in B., in the said county of S., and then and there lawfully detained in the custody of the keeper of said prison, by divers processes then in force against them; and that they the said C. D., E. F., and G. H., wickedly contriving and intending, as much as in them lay, to break down, demolish, prostrate, and destroy part of the wall belonging to, and inclosing the said prison, and thereby unlawfully to effect the escape of themselves, and of divers other prisoners then lawfully confined in the said prison, and in custody of the keeper thereof, from and out of the same, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree among themselves for the purposes aforesaid, and being so assembled and met together, did then and there, in pursuance of the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, unlawfully and wickedly begin to break down, demolish, prostrate, and destroy part of the said wall, with intent thereby unlawfully to effect the escape of themselves, and the said other prisoners, so there confined in the said prison, and in the custody of the keeper thereof; against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

For a Conspiracy, by Prisoners, and attempting to blow up the Wall of the Prison with Gunpowder.

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D., E. F., and G. H., all of in the county aforesaid, laborers, at the time next hereafter mentioned, were prisoners lawfully confined in the Commonwealth's prison, situate in B. aforesaid, in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by virtue of divers processes then in legal force against them; and that the said C. D., E. F., and G. H., contriving and intending, as much as in them lay, to break down, blow up, demolish, prostrate, and destroy a certain part of the wall of said prison belonging to and inclosing the same, and thereby to effect the escape of them-

* 2 Chit. C. L. 1150.

selves, and of divers other prisoners, then lawfully confined in said prison, and in the custody of the keeper thereof, from and out of said prison, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree among themselves, for the purpose aforesaid ; and that, in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, they the said C. D., E. F., and G. H., did then and there make, and cause and procure to be made, a certain large hole or breach in the said wall of the said prison, and then and there unlawfully and wickedly put, placed, and laid a large quantity of gunpowder into the said hole or breach, so as aforesaid made in the said wall, with intent to set fire to the said gunpowder, and thereby to break down, blow up, demolish, prostrate, and destroy part of the said wall, and by means last mentioned to effect the escape of themselves, and the said other prisoners, so confined in the said prison, and in custody of the keeper thereof, from and out of the same ; against the peace and dignity of said Commonwealth.* Wherefore &c.

For a Conspiracy to persuade a Man not to give Evidence against one committed for Trial.

A. B. of B., in the county of S., yeoman, upon his oath complains, that at the time of the conspiracy, combination, confederacy, and agreement hereafter mentioned, one C. D. was a prisoner in the Commonwealth's prison, situate in B. aforesaid, in the county aforesaid, lawfully committed and charged with felony, by him before that time committed ; and a certain indictment was about to be preferred against him the said C. D. for the said felony, and that one E. F. was a material witness in support of such bill of indictment ; and that G. H. , I. J., and K. L., all of in the county of laborers, being evil disposed persons, and well knowing the premises aforesaid, and contriving and intending, as much as in them lay, to prevent the due course of law and justice, and to prevent the said E. F. from attending as a witness in support of the said bill of indictment, about to be preferred as aforesaid, on the day of now last past, at B. aforesaid, in the county aforesaid, and while the said C. D. was a prisoner in the said prison as last aforesaid, for the said last mentioned felony, wilfully and corruptly did conspire, combine, confederate, and agree among themselves, to prevent, as much as

* 2 Chit. C. L. 1151.

in them lay, the said E. F. from attending as a witness in support of said bill of indictment, so about to be preferred against him the said C. D., as last aforesaid; to the great obstruction of public justice, and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

For a Conspiracy to cheat another, without alleging any overt Act.

A. B. &c. upon his oath complains, that C. D. and E. F. &c. being evil disposed persons, and wickedly devising and intending one G. H. to injure and defraud, on the day of at in the county aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, the said G. H. to injure and defraud of his moneys, goods, and chattels; against the peace and dignity of the Commonwealth aforesaid.†

CORRECTION.—See “House of Correction.”

DEAD BODIES.—See “Sepulchres of the Dead.”

DECEIT.—See “Cheats.”

DUELLING.

DELIBERATE duelling is, where both parties meet avowedly with intent to murder; and therefore the law has justly fixed the crime and punishment of murder upon those who engage in it, and upon their seconds.‡ This practice is pursued in some parts of this country, in a manner which indicates a greater contempt of the laws both of God and man, than in most parts of Europe. It places the combatants, in point of ferocity, upon a level with the brutes of the forest; and in point of guilt exceedingly below them. The public feeling and sentiment is changing in this part of the country, upon this subject. Heretofore duellists were viewed with *horror*; they are now viewed with *contempt*; and

* 2 chit C. L. 1155.

† As the law now seems to be settled, in the case of the Commonwealth v. Judd & al. before cited, this form, concise as it appears to be, will be sufficient to charge persons before a justice for the crime of conspiracy; and they may be safely examined and bound over upon such complaint.

‡ 4 Bla. Com. 199

instead of being ranked among men of honor, they are now rather considered as *ferocious cockroaches*, who deserve the *scorn* as well as the detestation of society. The punishment of death has been, and ever will be, found inadequate to the suppression of this horrid crime. Instead of *death*, I should propose some punishment that would make *life* a burden and a disgrace to the duelist,—confinement to hard labor for life in the state prison,—mutilation or laceration of his body,—the mark of Cain, the first murderer, which should excite a mixture of horror and scorn in the breast of every person that beholds him. These might have some effect upon the minds of those, whom the fear of capital punishment would fail to influence.

A person who kills another in a duel, and all persons concerned with him as seconds, are guilty of murder, in its most atrocious form. There can be no greater evidence of deliberate and brutal malice, than that which always accompanies the preparations for a duel. The second of the party killing, is equally implicated with the principal, and equally liable to be punished for the murder. Some have supposed also, that the seconds of the deceased are equally guilty and liable, since the fighting was upon a compact. Lord Hale thinks this opinion too severe.* Why is it too severe? Lord Hale was a man of the greatest humanity; and perhaps his doubt upon this subject proceeded more from his feeling than his judgment. The second of the deceased is as much accessory to his murder, as the second of the party killing. For, according to those ridiculous laws of honor, (which ought not to be named except among the contemptible wretches that are ruled by them,) there can be no duel without a second. If, therefore, every person, who is solicited, should refuse to become a second in a duel, the practice must cease. If the combatants should still pursue their murderous purposes, and meet, and fight alone, the transaction would then be known by its proper name, that of *assassination*.

It is laid down in Hawkins,† that he who kills another, upon his desire or command, is, in the judgment of the law, as much a murderer, as if he had done it merely of his own head. The

* 1 Hale, 443.

† B. 1, c. 27, s. 6.

language of a duellist to his second is, "I am preparing to have myself murdered, and I claim your assistance." If, in the event, he be murdered, he is not even *felo de se*, because his assent to be murdered is void; still he has been murdered, and his second was accessory to it before the fact. Lord Hale admits, that the second of the deceased is guilty of a great misdemeanor. It is difficult to discern upon what principle the offence is denominated a *misdemeanor*. The nature of the act shows it to be the aiding, assisting, and *comforting* of a murderer before the fact; that is, assisting a man either to commit a murder, or to be himself murdered by his own consent, either of which is clearly murder with malice aforethought. It is all murder, by compact; and the second of the deceased, being one of the parties to it, is as much implicated in the guilt, as any other of the parties.

The following forms, for engaging in a duel, and challenges to fight, are drawn upon the statute of this Commonwealth, providing for the punishment of murder, duelling, &c.* There are a great variety of forms for sending challenges, to be found also in 2 Chit. C. L. 848, Riley's Ed. c. 14.

Form of a Complaint for engaging in a Duel, where no Homicide ensued: On the Sixth Section of the Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of &c. being a person wholly regardless of the life of man, and holding in contempt the authority and government of the Supreme Giver and Disposer of human life, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did voluntarily engage in a duel with one E. F., with dangerous weapons, to wit, with pistols, then and there loaded with gunpowder and leaden bullets, to the great hazard of the lives of them the said C. D. and E. F., in which duel, engaged in as aforesaid by them the said C. D. and E. F., no homicide did ensue thereon; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.†

* Stat. 1804, chap. 123.

† A complaint against the parties, when the duel is actually fought, but no homicide ensued thereon, may also be laid upon the statute for a felonious assault with intent to murder. See ante, "Felonious Assaults," for such a form.

*For challenging a Person, by written Message, to fight a Duel :
On the Sixth Section of the Statute.*

A. B. of B., &c. upon his oath complains, that C. D. of in the county of yeoman, being a person of a malicious and revengeful disposition, and a common disturber of the peace of the said Commonwealth, and intending and designing one E. F., in the peace of the said Commonwealth then and there being, wilfully, maliciously, and of his malice aforethought, to kill and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully and maliciously, by a [written] message, provoke, excite, and challenge him the said E. F. to fight a duel with him the said C. D. with dangerous weapons, to wit, with pistols ; and that he the said C. D. a certain challenge, in the name of him the said C. D., and in the form of a [written] message, to him the said E. F. directed, did then and there wilfully and maliciously write and cause to be written and directed ; and that he the said C. D. the said message did then and there wilfully and maliciously send and deliver, and cause and procure to be sent and delivered to the said E. F. ; to the great damage and terror of him the said E. F., against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

*For being a Second or Agent in a Duel : On the Sixth Section
of the Statute.*

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of B. aforesaid, gentleman, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, did make an assault, with intent him the said E. F. then and there wilfully, maliciously, and of his malice aforethought, to kill and murder ; and that he the said C. D. did then and there voluntarily engage in a duel with the said E. F. with dangerous weapons, to wit, with pistols, then and there loaded with gunpowder and leaden bullets, to the great hazard of the lives of them the said C. D. and E. F., in which duel, engaged in as aforesaid, no homicide did ensue thereon ; and the said A. B., upon his oath aforesaid, further complains, that I. H. of B. aforesaid, gentleman, being

* If the challenge is by word, the same form will answer, stating that the challenge was by " word and verbal message."

a person regardless of the life of man, and holding in contempt the authority and government of the Supreme Giver and Disposer of human life, on the said day of in the year aforesaid, with force and arms at B. aforesaid, in the county aforesaid, did knowingly become, and then and there knowingly was the second of the aforesaid C. D., and was then and there knowingly an agent and abetter of him the said C. D. in the duel aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For being Second to a Person giving the Challenge, when no Duel is fought: On the Sixth Section of the Statute.

[Draw the complaint for sending the challenge according to the preceding form in that case, and then go on:] And the said A. B., upon his oath aforesaid, further complains, that G. H. of B. aforesaid, in the county aforesaid, gentleman, on the said day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did become, and then and there knowingly was a second, agent, and abetter of him the said C. D., in the giving, sending, and delivering of the challenge aforesaid, from him the said C. D. to the said E. F.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For accepting a Challenge to fight a Duel: On the Seventh Section of the Statute.

A. B. of B., in the county aforesaid, gentleman, upon his oath complains, that C. D. of in the county of gentleman, being a person regardless of the life of man, and holding in contempt the authority and government of the Supreme Giver and Disposer of human life, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did accept a challenge to fight a duel with one E. F., and did then and there consent to fight therein with him the said E. F. with dangerous weapons, to wit, with pistols, loaded with gunpowder and leaden bullets, to the hazard of the lives of them the said C. D. and E. F.; which challenge the said C. D. had before that time sent, given, and delivered, and caused and procured to be sent, given, and delivered to the said E. F. to fight said duel, by a message for that purpose; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

ELECTIONS.

OFFENCES against the election laws are generally created by statutes, of which there are several now in force in this state. The abuse and fraudulent use of the right of suffrage, is also an offence at common law ; and has been considered and punished as such in the courts of this Commonwealth. The statutes, regulating the public elections, relate to the choice of state officers only, viz. governor, lieutenant governor, counsellors and senators, and members of congress. There is no statute creating a particular penalty for fraudulent voting in the choice of town officers. But this has been held to be an offence at common law, and prosecutions for it have been instituted and maintained in our courts.* Indictments have also been maintained against officers of towns, such as selectmen &c., for a fraudulent use or abuse of their powers in conducting the public elections, upon the common law principle, that there is an implied engagement in the acceptance of all offices, that they shall be faithfully executed. Perhaps there is no country in the world, where, from the excellence of the laws, and the correct habits of the people, the freedom and purity of elections are better preserved, than in New England.

Form of a Complaint against a Person, for fraudulent voting at an Election of Governor &c. : On the Third Section of the additional Act for regulating Elections.†

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that on the first Monday of April now last past, (it being the sixth day of said month,) the male inhabitants of the said town of B., in the county aforesaid, were convened, according to the constitution and laws of this Commonwealth, in legal town meeting for the choice and election of Governor, Lieutenant Governor, Counsellors and Senators, for this Commonwealth, for the year then next ensuing and now current ; at which meeting of said inhabitants, C. D. of said B., yeoman, appeared, to give in his vote and list of persons to be voted for, at the choice and

* A case in Essex, and another in Berkshire, have occurred.

† Stat. 1800, chap. 74.

election aforesaid, he the said C. D. being then and there one of the male inhabitants of said town of B., and legally qualified to give in his vote and list at the choice and election aforesaid ; and that he the said C. D., being a person regardless of the rights of the people, and of the freedom and purity of elections in this Commonwealth, and of the several laws thereof made to regulate and preserve the same, on the said sixth day of April, in the year aforesaid, at B. aforesaid, in the county aforesaid, did knowingly and designedly give in more than one vote and list of persons to be elected and chosen into the said offices, at one time of balloting at the choice and election aforesaid ; against the peace of said Commonwealth, and against the form of the several statutes in such case made and provided.* Wherefore &c.

Against the Selectmen of a Town, for fraudulently admitting Persons not qualified to vote at an Election.

A. B. of B., in the county aforesaid, Esq., upon his oath complains, that on the first Monday of April, now last past, (it being the sixth day of said month,) the male inhabitants of the town of Northfield, in the county of Franklin, were duly and legally convened in public town meeting, according to the constitution and laws of this Commonwealth, for the purpose of giving in their votes and lists at the choice and election of Governor, Lieutenant Governor, Counsellors and Senators, of this Commonwealth, for the year then ensuing and now current ; at which said town meeting, C. D., E. F., and G. H., all of whom were the selectmen of the said town of Northfield for the year aforesaid, having been legally chosen and sworn into that office, appeared to preside at and regulate said town meeting, and did then and there undertake to preside at and regulate said meeting, according to their oath and duty in that behalf ; and that the said C. D., E. F., and G. H., selectmen as aforesaid, being persons regardless of the rights of the people, and of the freedom and purity of elections, and of the constitution and laws of this Commonwealth regulating the same, on the said sixth day of April aforesaid, at Northfield aforesaid, in the county aforesaid, *did knowingly and corruptly neglect and refuse to comply with and perform their several duties, respectively required of them by law, as pointed out in and by the constitution and laws of this Commonwealth ; that*

* When the complaint is founded on more than one statute, the conclusion must be, against the form of the "several statutes," &c. ; as in the case of this offence of fraudulent voting, there are two statutes, creating the offence and increasing the penalty, &c.

is to say, the said C. D., E. F., and G. H., while presiding at said town meeting, and regulating the same, in their said office and capacity of selectmen as aforesaid, on the said sixth day of April, in the year aforesaid, at Northfield aforesaid, did knowingly and corruptly admit one Lewis Field, one Robert Trip, and one James Robinson, to give in their votes and lists, at the town meeting and choice aforesaid, and did then and there knowingly and corruptly receive the votes and lists of persons to be then and there voted for, elected, and chosen into the offices aforesaid, of them the said Lewis Field, Robert Trip, and James Robinson, when in truth and in fact they had no right to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid, at said meeting and choice, and had not the qualifications required by the constitution and laws of this Commonwealth to authorize them to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid, at the meeting and choice aforesaid; that is to say, the said Lewis Field was not an inhabitant of the said town of Northfield, on the said sixth day of April aforesaid, and did not dwell, and had not his home therein; and that the said Robert Trip and James Robinson, on the said sixth day of April aforesaid, or at any other time, had not, nor had either of them a freehold estate, within the said Commonwealth, of the annual income of ten dollars, nor any estate of the value of two hundred dollars; of all which the said C. D., E. F., and G. H., were then and there well knowing; and that the same votes and lists of them the said Lewis Field, Robert Trip, and James Robinson, so as aforesaid knowingly and corruptly admitted and received by them the said C. D., E. F., and G. H., they the said C. D., E. F., and G. H., did knowingly and corruptly cause to be recorded and returned upon the list of persons voted for as Governor, Lieutenant Governor, Counsellors and Senators, for the year aforesaid, at the meeting and choice aforesaid; which list, containing the votes of the said Field, Trip, and Robinson, they the said C. D., E. F., and G. H., did knowingly and corruptly transmit, and cause to be transmitted to the office of the secretary of the said Commonwealth; they the said C. D., E. F., and G. H., well knowing that the said Field, Trip, and Robinson, were not qualified, according to the constitution and laws of this Commonwealth, to vote and give in their lists of persons to be voted for, elected, and chosen into the offices aforesaid, in violation of, and contrary to the oath and duty of them the said C. D., E. F., and G. H., faithfully and impartially to discharge and perform the duties of their said offices, respecting the aforesaid elec-

tions, and the returns thereof; to the great prejudice of the freedom and purity of elections in this Commonwealth, and against the peace and dignity of the same, and against the form of the several statutes in such case made and provided.* Wherefore &c.†

EMBRACERY.

EMBRACERY, as defined by Blackstone,† is an attempt to influence a jury corruptly to one side, by promises, persuasions, intreaties, money, entertainments, and the like. There is a more full description of this pernicious offence, by Hawkins, where it is said, that *any attempt whatsoever* to corrupt, or influence, or *instruct* a jury, or *any way to incline them* to be more favorable to the one side than the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of counsel in open court at the trial of the cause, is a proper act of embracery, whether the jurors, on whom such attempt is made, give any verdict or not, or whether the verdict given be true or false. And the law so far *abhors* all corruption of this kind, that it prohibits every thing *which has the least tendency to it*, what specious pretence soever it may be covered with; it will not suffer a mere stranger so much as to desire a juror to appear and act according to his conscience.§ To give money to a juror, after verdict, without any precedent contract in relation to it, is an offence; the giving of money to another to be distributed among jurors is an offence, whether it be actually distributed or not. And it is as criminal in a juror, as in any other person, to endeavour to prevail with his companions to give a ver-

* The penalties upon these statutes may be recovered in a *qui tam* action therefor, See 6 M. R. 347.

† As the offence, set forth in this form of a complaint, is not expressly created by any statute, it is advisable to conclude the complaint both at common law, and against the several statutes.—See stat. 1806, chap. 26, sec. 4, as to oath of selectmen.

‡ 4 Bla. Com. 140.

§ Hawk. b. 1, c. 85, s. 1 & 2.

dict for one side, by any practices whatsoever, except only by arguments from the evidence produced, and from the general obligations of conscience to give a true verdict. It is also clearly an act of embracery for the party, or his counsel, or any person whatever, to attempt to influence a jury by indirect practices, as promises, menaces, or instructions to them in the cause beforehand.*

By our statute, regulating the selections, and services of jurors,† any treat or gratuity given to jurors during the session of the court, knowing them to be such, whether before or after verdict, is a sufficient reason to set aside the verdict, and award a new trial of the cause. These excellent principles and provisions, which show the purity and delicacy with which justice is supposed to be administered, are too often violated. Embracery is an increasing offence in many parts of the country, and requires the vigilance of all good citizens to stop its progress.

It is singular, that an offence of so pernicious a nature, in the administration of justice, is so slightly noticed, either by the writers upon criminal law, or in the books of precedents of indictments. The following precedent is taken, in substance, from Tremaine's Pleas of the Crown,‡ and is the only one to be met with, either in that collection, or in the Crown Circuit Companion, or the Crown Circuit Assistant.

Form of a Complaint for Embracery, by persuading a Juror to give his Verdict in favor of the Defendant, and for soliciting the other Jurors to do the like.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of in the county of yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, knowing that a jury of the said county of S. was then duly returned, sworn, and impannelled, to try a certain issue joined in the Supreme Judicial Court, then held according to law, at B. aforesaid, in and for the county of S. aforesaid, between E. F., plaintiff, and G. H., defendant, in a plea of the

* Hawk. b. 1, c. 85, s. 3, 4, 5.

† Stat. 1812, chap. 141.

‡ 1 Trem. P. C. 175, 176.

case; and then also knowing that a trial was to be had upon the said issue, on the day of in the year aforesaid, before the said Supreme Judicial Court, then and there held for the said county of S., the said C. D., devising wickedly and unlawfully to hinder the due and lawful trial of the said issue by the jurors aforesaid, returned, impanelled, and sworn as aforesaid to try the said issue, on the day of in the year aforesaid, at B. in the county aforesaid, unlawfully, wickedly, and unjustly, on behalf of the said G. H., the defendant in the said cause, did solicit and persuade one I. J., one of the jurors of the said jury, returned, impanelled, and sworn according to law for the trial of said issue, to appear and attend in favor of the said G. H., the said defendant; and then and there did say and utter to the said I. J., one of the jurors as aforesaid, divers words and discourses by way of commendation, on behalf of him the said G. H., the said defendant, and disparagement of the said E. F., the plaintiff; and that he the said C. D. did then and there unlawfully and corruptly move and desire the said I. J. to solicit and persuade the other jurors returned, impanelled, and sworn to try the said issue, to give a verdict for the said G. H., in the said cause, he the said C. D. then and there well knowing that the said I. J. was one of the jurors returned, impanelled, and sworn to try the said issue; and that the jurors of the said jury by reason of speaking and uttering the words and discourses aforesaid, did give their verdict for the said G. H. in the cause aforesaid; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.*

ESCAPE.

AN escape of a person arrested upon criminal process, by eluding the vigilance of his keepers, before he is committed to prison, is an offence against public justice, and the party himself is punishable for it, at common law. But the officer permitting such escape, either by negligence or connivance, is much more

* The last allegation in this complaint, viz. that the jury gave their verdict for the defendant, by reason of the words, discourses, &c. is not necessary. The crime is complete by the attempt, whether it succeed or not.—Hawk. b. 1, c. 85, s. 1 & 2.

culpable than the prisoner. Officers, therefore, who, after arrest, *negligently* permit a prisoner to escape, are punishable ; but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence, and are punishable in the same degree as the offence of which the prisoner is guilty, whether treason, felony, or trespass.*

These principles of the common law are conformable to the provisions of our statute upon this subject. By the fourth section of the statute for providing and regulating prisons,† it is enacted, “ that every gaoler or prison-keeper that shall voluntarily suffer any prisoner, committed to him, to escape, shall suffer and undergo the like pains, punishment, and penalties, as the prisoner so escaping should, by law, for the crime or crimes wherewith he stood charged, if he had been convicted thereof ;” and in the same section, it is further provided, “ that if the gaoler or prison-keeper shall, through negligence, suffer any prisoner accused of any crime to escape,” he shall pay a fine, at the discretion of the court. By the third section of the same statute, the offence of conveying any instrument to a prisoner, or into the prison, without the knowledge of the keeper, whereby such prisoner might break the prison, is made punishable by fine or corporal punishment ; and if the prisoner shall actually escape, by means of any instrument so conveyed, the offender is to be more severely punished by fine, imprisonment, or other infamous punishment, as the court shall think proper to inflict.

Form of a Complaint, at Common Law, for escaping from a Constable, being in Custody under a Warrant of Larceny.

A. B. of B., in the county of S., gentleman, upon his oath complains, that he the said A. B., being one of the constables of said town of B., duly and legally authorized to execute and perform the duties of that office, on the day of now last past, at B. aforesaid, in the county aforesaid, did take and arrest one C. D., late of in the county aforesaid, laborer, by virtue of a warrant from E. F., one of the justices of the peace in and for the county aforesaid, on suspicion of having committed a certain felony in feloniously stealing, taking, and

* 4 Bla. Com. 130 ; Hawk. b. 2, c. 18.

† Stat. 1784, chap. 41.

carrying away one gelding, of the value of dollars, of the property of one G. H., and that thereupon he the said C. D., under the custody of him the said A. B., the constable as aforesaid, was then and there brought before the said E. F., Esq., one of the justices of the peace in and for the county aforesaid, duly authorized to discharge and perform the duties of that office. Whereupon such proceedings were had, that he the said E. F., Esq., by his warrant of commitment, directed to him the said A. B. and others, did then and there command him the said A. B. to carry and convey the said C. D. to the gaol of said Commonwealth, at B. aforesaid, in the county aforesaid, there to be safely kept until he should be lawfully delivered from thence by due course of law; by virtue of which warrant, the said C. D. was then and there taken and detained by him the said A. B.; and as he the said A. B. was conveying and carrying him the said C. D. to the gaol aforesaid, afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, he the said C. D. did forcibly break away and escape from and out of the custody of him the said A. B., constable as aforesaid, against the will of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

Against a Prisoner in Custody, for breaking out of Gaol.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of in the same county, laborer, on the day of now last past, at B. aforesaid, was arrested, detained, and imprisoned, in the Commonwealth's gaol, situate at B. aforesaid; for a certain felony by him committed, that is to say, for feloniously stealing, taking, and carrying away one gelding, of the value of one hundred dollars, of the goods and chattels of one E. F., and that he the said C. D. on at &c. with force and arms, the aforesaid gaol of the said Commonwealth did break, and thereby did then and there escape from and out of the same; against the peace and dignity of the Commonwealth aforesaid.†

Against a Constable, for negligently permitting a Man to escape who was arrested by him.

A. B. of B., in the said county of S., gentleman, upon his oath complains, that on the day of now last past, at

* 2 Chit. C. L. 159.

† 2 Chit. C. L. 160; Burns J. Prison breaking.

B., in the said county of S., one C. D. came before E. F. Esq., then one of the justices of the peace in and for the said county of S., duly and legally qualified and empowered to discharge and perform the duties of said office; and the said C. D. did then and there, on his oath before said justice, charge, accuse, and complain, that one G. H. of B. aforesaid, laborer, [*here set forth the complaint.*] Whereupon such proceedings were had, that the said justice did then and there make a certain warrant under his hand and seal, in due form of law, directed to the sheriff of the said county of S., or his deputy, or to any of the constables of the town of in the county aforesaid, thereby requiring them and each of them to take the body of the said G. H. and bring him before the said E. F. Esq., the justice aforesaid, to be dealt with touching the said complaint, as to law and justice might appertain; which said warrant afterwards, on the day and year aforesaid, at B. aforesaid, was delivered to I. J. of said Boston, in the county aforesaid, yeoman, (he being then and there one of the constables of the said town of B., duly appointed, qualified, and sworn to discharge and perform the duties of said office,) in due form of law to be by him served and executed; by virtue of which warrant, the said I. J. afterwards, to wit, on the day of in the year aforesaid, at B. aforesaid, did take and arrest the body of him the said C. D., and him in his custody for the cause aforesaid then and there had. Nevertheless the said I. J. on the said day of in the year aforesaid, at B. in the county aforesaid, the duties of his office in that respect not regarding, unlawfully and negligently did permit the said G. H. to escape and go at large wheresoever he would, out of the custody of him the said I. J.; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.*

Against a Gaoler, for permitting a voluntary Escape of a Prisoner convicted of Felony: On the Fourth Section of the Statute regulating Prisons.†

A. B. of B., in the county of S., yeoman, upon his oath complains, that at the Supreme Judicial Court, begun and holden at [*here set forth the time &c. of holding the court,*] one C. D. was duly and legally convicted of the crime of larceny in feloniously

* The same form is to be used in case of a *voluntary* escape, by substituting the word "voluntarily," for the word "negligently," towards the close of the complaint.

† Stat. 1784, chap. 41.

carrying away one gelding, of the value of dollars, of the property of one G. H., and that thereupon he the said C. D., under the custody of him the said A. B., the constable as aforesaid, was then and there brought before the said E. F., Esq., one of the justices of the peace in and for the county aforesaid, duly authorized to discharge and perform the duties of that office. Whereupon such proceedings were had, that he the said E. F., Esq., by his warrant of commitment, directed to him the said A. B. and others, did then and there command him the said A. B. to carry and convey the said C. D. to the gaol of said Commonwealth, at B. aforesaid, in the county aforesaid, there to be safely kept until he should be lawfully delivered from thence by due course of law; by virtue of which warrant, the said C. D. was then and there taken and detained by him the said A. B.; and as he the said A. B. was conveying and carrying him the said C. D. to the gaol aforesaid, afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, he the said C. D. did forcibly break away and escape from and out of the custody of him the said A. B., constable as aforesaid, against the will of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

Against a Prisoner in Custody, for breaking out of Gaol.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of in the same county, laborer, on the day of now last past, at B. aforesaid, was arrested, detained, and imprisoned, in the Commonwealth's gaol, situate at B. aforesaid; for a certain felony by him committed, that is to say, for feloniously stealing, taking, and carrying away one gelding, of the value of one hundred dollars, of the goods and chattels of one E. F., and that he the said C. D. on at &c. with force and arms, the aforesaid gaol of the said Commonwealth did break, and thereby did then and there escape from and out of the same; against the peace and dignity of the Commonwealth aforesaid.†

Against a Constable, for negligently permitting a Man to escape who was arrested by him.

A. B. of B., in the said county of S., gentleman, upon his oath complains, that on the day of now last past, at

* 2 Chit. C. L. 159.

† 2 Chit. C. L. 160; Burns J. Prison breaking.

B., in the said county of S., one C. D. came before E. F. Esq., then one of the justices of the peace in and for the said county of S., duly and legally qualified and empowered to discharge and perform the duties of said office; and the said C. D. did then and there, on his oath before said justice, charge, accuse, and complain, that one G. H. of B. aforesaid, laborer, [*here set forth the complaint.*] Whereupon such proceedings were had, that the said justice did then and there make a certain warrant under his hand and seal, in due form of law, directed to the sheriff of the said county of S., or his deputy, or to any of the constables of the town of _____ in the county aforesaid, thereby requiring them and each of them to take the body of the said G. H. and bring him before the said E. F. Esq., the justice aforesaid, to be dealt with touching the said complaint, as to law and justice might appertain; which said warrant afterwards, on the day and year aforesaid, at B. aforesaid, was delivered to I. J. of said Boston, in the county aforesaid, yeoman, (he being then and there one of the constables of the said town of B., duly appointed, qualified, and sworn to discharge and perform the duties of said office,) in due form of law to be by him served and executed; by virtue of which warrant, the said I. J. afterwards, to wit, on the _____ day of _____ in the year aforesaid, at B. aforesaid, did take and arrest the body of him the said C. D., and him in his custody for the cause aforesaid then and there had. Nevertheless the said I. J. on the said _____ day of _____ in the year aforesaid, at B. in the county aforesaid, the duties of his office in that respect not regarding, unlawfully and negligently did permit the said G. H. to escape and go at large wheresoever he would, out of the custody of him the said I. J.; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.*

Against a Gaoler, for permitting a voluntary Escape of a Prisoner convicted of Felony: On the Fourth Section of the Statute regulating Prisons.†

A. B. of B., in the county of S., yeoman, upon his oath complains, that at the Supreme Judicial Court, begun and holden at [*here set forth the time &c. of holding the court,*] one C. D. was duly and legally convicted of the crime of larceny in feloniously

* The same form is to be used in case of a *voluntary* escape, by substituting the word "voluntarily," for the word "negligently," towards the close of the complaint.

† Stat. 1784, chap. 41.

stealing, taking, and carrying away fifty pounds of tea, of the value of thirty dollars, of the goods and chattels of one E. F. Whereupon it was considered and adjudged by the said court, that the said C. D. should be imprisoned, [*here set forth the sentence of the court.*] And the said A. B., upon his oath aforesaid, further complains, that afterwards, at the Supreme Judicial Court above mentioned, the said C. D., by order of the said court, was committed to the care and custody of G. H., then and still being the gaoler and prison-keeper of the Commonwealth's gaol, situated at B. aforesaid, there to be kept and imprisoned in the said gaol and prison, according to, and in pursuance of the order and sentence aforesaid; and the said G. H. him the said C. D. in his custody then and there had for the cause aforesaid; he the said C. D. having stood charged and been committed as aforesaid, of the aforesaid felony and larceny, and thereupon committed as a prisoner as aforesaid to him the said G. H.; and the said A. B., upon his oath aforesaid, further complains, that the said G. H. of said B., Esq., afterwards and before the expiration of the term for which the said C. D. was so as aforesaid ordered to be imprisoned, to wit, on the day of now last past, at B. in the county aforesaid, unlawfully, voluntarily, and contemptuously did permit and suffer the said C. D. to escape and go at large out of the said gaol and prison; contrary to the duty of him the said G. H., and against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

For conveying Instruments into a Prison, with Intent to facilitate the Escape of a Prisoner: On the Third Section of the Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that heretofore, to wit, on the day of now last past, at B. aforesaid, C. D. Esq., then being one of the justices of the peace in and for the said county of S., duly and legally authorized and empowered to discharge and perform the duties of said office, did make out his warrant of commitment, in due form of law, bearing date the day and year aforesaid, directed to the keeper of the Commonwealth's gaol in B. aforesaid, his under-keeper, or deputy; by which said warrant of commitment the said justice did require the said keeper of

* The same form is to be used in case of a negligent escape, substituting the word "negligently," for the word "voluntarily," towards the close of the complaint.

said gaol, his under-keeper, or deputy, to receive into their custody the body of one E. F., who was therewith sent to them, the said keeper, his under-keeper, or deputy, (the said E. F. having been brought before him the said justice, and charged upon the oath of one G. H. with having feloniously stolen, taken, and carried away a certain gelding, of the value of fifty dollars, the property of him the said G. H.,) and him the said E. F. safely to keep, until he should be discharged by due course of law; which said warrant of commitment is of the following purport and effect, [*here set forth the warrant of commitment.*] By virtue of which said warrant, the said E. F. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, was conveyed, committed, and delivered to the Commonwealth's said gaol, situated in said B., and to the keeper thereof, for the cause aforesaid, to wit, for the felony and larceny aforesaid. And the said E. F. was then and there lawfully kept and detained a prisoner, in the aforesaid gaol, under the custody of J. H. Esq., then being the keeper of said gaol, for the felony aforesaid; and the said A. B., upon his oath aforesaid, further complains, that I. J. of B. aforesaid, laborer, on the day of now last past, with force and arms, at B. in the county aforesaid, did unlawfully convey, and cause and procure to be conveyed, into the said gaol and prison two steel files, being instruments proper to facilitate the escape of prisoners, out of the gaol and prison aforesaid; and the same files did then and there deliver, and cause and procure to be delivered to the said E. F., (he being then and there a prisoner in said gaol and prison, and then and there lawfully detained therein for the felony and larceny aforesaid,) without the knowledge and privity of the said keeper of said gaol and prison, or of any under-keeper of the same; which said files, being such instruments as aforesaid, were then and there so conveyed into the said gaol and prison, and delivered to the said E. F. as aforesaid by him the said I. J., with intent that he the said E. F. might thereby, and therewith, break the said gaol and prison, and unlawfully work himself out of the same; and with intent to aid and assist the said E. F. to escape, and attempt to escape from and out of the said gaol and prison; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

* See a variety of other forms in 2 Chitty C. L. 171, 172, 173, 174, 175, 167, 177.

EXTORTION.

EXTORTION is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.* In a large sense, it signifies any oppression under color of right.† It was a high misdemeanor at common law; and therefore an indictment lies against any officer or other person for demanding more than is due, or for refusing to execute a process until he has been paid his fees.‡

When a statute annexes a fee to an office, it will be extortion to take more than it specifies. But it is not criminal for an officer to take a reward, voluntarily offered to him, for the more diligent or expeditious performance of his duty.§ But a promise to pay him money for any act of duty, which the law does not suffer him to receive, is absolutely void, however freely it may have been given. The complaint must state the sum which the defendant received; and it will not be sufficient to aver that he received a gift or reward, without specifying the value;|| though it is not material to prove the exact sum alleged.¶

Prosecutions for extortion, in this state, are founded upon the statute establishing and regulating the fees of officers;** which creates a penalty of thirty dollars for every offence; to be recovered, either by indictment, or by action of debt; in the latter case the whole penalty enures to the party who brings the action.

Form of a Complaint against a Justice of the Peace for Extortion: On the Sixth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B. Esq., on the day of

* 4 Bla. Com. 141.

† 1 Hawk. b. 1, c. 68, s. 1.

‡ Com. Dig. Extortion A.

§ 2 Inst. 210, 211.

|| 4 Burr. 2471; 2 Leach, 794.

¶ Id.

** Stat. 1796, chap. 41, sec. 6.

now last past, then being one of the justices of the peace in and for the said county of S., duly and legally qualified to perform the duties of said office, not regarding the duties of his said office, but contriving and intending him the said A. B. to injure and oppress, on the said day of in the year aforesaid, at B. in the county aforesaid, by color of his said office, did wilfully, corruptly, and extorsively demand, take, and receive of him the said A. B. a greater fee than is allowed and provided by law, for the trial of an issue, then and there in due form of law joined and pending before him the said C. D. as a justice of the peace for the said county of S., between him the said A. B. and one E. F., in a certain civil action commenced and entered by the said A. B. against the said E. F., before him the said C. D., justice as aforesaid, at a justice's court duly appointed, and then and there held by him the said C. D., to wit, the sum of one dollar for the trial of said issue; which sum is more than the fee allowed and provided by law for the service aforesaid; to the great damage, injury, and oppression of him the said A. B., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

* This form may be adopted, *mutatis mutandis*, in complaints for extortion against all other officers and persons. There are a great variety of other precedents for extortion in the Crown Circuit Companion, Chitty's Crown Law, and other books of precedents. But as the penalty, created by our statute, may be recovered, as well by action of debt in the name of any person who will sue for it, as by a criminal prosecution, it is thought unnecessary to add any other forms or precedents, because, by the decision in the case of the Commonwealth v. Cheney, 6 M. R. 347, a justice of the peace cannot hold the offender to bail for this offence, and therefore has no jurisdiction of it in any form whatever.

FORGERY AND COUNTERFEITING.

THE English judges seem to have *sported* their opinions in the definition of this offence.* The best definition of it is, the false making or alteration of a written instrument, with intent to deceive and defraud. No writer upon criminal law has defined it precisely in these words; but this definition results from all the authorities taken together. It is an offence punishable as a misdemeanor at common law.† In England a more severe punishment is inflicted on the offender, by a variety, or rather a multitude of statutes.‡ By some of these the offence is made capital; or in the old and *ludicrous* language of the English law, felony *without the benefit of clergy*.

The essence of the offence is the fraudulent intent. The *making*, with sufficient fraudulent intent, of any instrument which is the subject of forgery, is a completion of the offence, before publication.§ For though publication is the medium by which the intent is manifested, yet it may be proved by other evidence; and by the statute law, the publication, with knowledge of the forgery, is usually made a substantive offence.

Making a fraudulent insertion, alteration, or erasure, in a material part of a true instrument; or the fraudulent application of the true signature to a false instrument, for which it was not intended, are as clearly forgeries as if the whole instrument had been fabricated; for any such alteration gives it a new operation.||

The making of any false instrument, which is the subject of forgery, with a fraudulent intent, although in the name of a fictitious or non-existing person, is as much a forgery, as if it had been made in the name of one who is known to exist, and to whom credit was due.

Every manner of exhibiting the instrument as a true one, with a knowledge of its being forged, is a publication or uttering of it.

It is essentially necessary to a complaint for forgery, that the instrument should be set forth in words and figures, if in the

* 2 East, P. C. 852, 853.

† Id.

‡ 4 Bla. Com. 245.

§ 2 East, P. C. 855.

|| 2 East, P. C. 855, 957.

possession of the magistrate or prosecutor. But if the instrument has been secreted, detained, or destroyed, by the party charged, it will be sufficient to allege, that the instrument was so detained, secreted, or destroyed, and therefore that the tenor or substance of it cannot be set forth in the complaint. The practice in this state, as will appear by the following precedents, is, to set forth the instrument to be "of the purport and effect following." It is most advisable to set it out in this manner, and not in the "tenor" following.

If any part of the true instrument be altered, the complaint may lay it to be a forgery of the whole instrument.* The instrument must be called by the name used in the statute, and set forth in the complaint, that it may appear whether it properly comes within the denomination ascribed to it.

The foregoing principles of law are taken from the English authorities upon the subject of forgery. The numerous statutes in that country, and the almost infinite variety of instruments and documents which, by these statutes, may be the subject of forgery, render the modern treatises upon this offence in some degree prolix and uninteresting.

The statute of this Commonwealth,† upon the subject of forgery and counterfeiting, is one of the most important in our statute book; and, excepting that for the punishment of larceny, the prosecutions upon it are more numerous than upon that of any other now in operation. It was drawn by a late highly respected and learned Chief Justice of the Supreme Judicial Court.‡ In some parts of it there is a departure from the language used in the English statutes relative to the same offence, which has been the occasion of judicial constructions which are in some measure original, but which have been clearly settled. And, as has been before observed, the statute being of great importance, and the public prosecutions upon it very frequent, the forms of a complaint, upon every section of it, and of the different offences, described in each section, are here given. They

* 2 East, P. C. 978.

† Statute 1804, chap. 120.

‡ The late Chief Justice Sewall.

will be found to be of great use in the daily practice of those magistrates who are in the habit of taking cognizance of criminal prosecutions.

The statute is entitled "An act against forgery and counterfeiting;" and its object is the punishment of every species of offence of that description. The first section provides for the punishment of forgeries, of the documents, papers, and contracts, therein specially enumerated, and for the uttering and publishing of them. And it is always to be recollected, that no document, contract, or paper, can be the subject of a forgery within the statute, which is not therein specially enumerated. The forgery and fabrication of *other papers* may be the subjects of a public prosecution upon the statute for the suppression and punishment of cheats;* but they are not the subjects of technical or statute *forgeries*.

The second section of the statute provides for the punishment of forgeries and counterfeiting of certificates of the public debt of this Commonwealth, and of the bank bills of the incorporated banks of this state, and for being possessed at one and the same time of more than ten of the latter, knowing them to be counterfeit, with intent to utter and pass the same. This part of this section of the statute has been the subject of judicial construction, as may be seen in the cases quoted below.†

The third section provides a punishment for uttering and tendering in payment any forged certificate of the public debt, and of the bank bills of the incorporated banks of this state; and also, the punishment for a second offence, or for three several convictions of the like offence, at the same term of the Supreme Judicial Court.

The fourth section provides the punishment for bringing into, or having in possession within this state, the counterfeit bills of the incorporated banks of this state, or of the incorporated banks of any other of the United States, with intent to pass the same.

* Stat. 1815, chap. 136.

† 8 M. R. *Commonwealth v. Murry Brown*, p. 59, and *Commonwealth v. Tilly Houghton*, p. 107.

The fifth section provides the punishment for making or mending any tools, instruments, or materials, adapted and designed for the forging and making of any of the afore-described certificates or bank bills, and for having the same in possession, with intent to use and employ them in forging and making such counterfeit securities and bank bills.

The sixth, seventh, and eighth sections contain provisions similar to those of the foregoing sections, in all cases of counterfeiting and uttering any gold or silver coin, current within the Commonwealth; and for making or being possessed of any tool, material, or instrument, adapted and designed for the coining and making of counterfeit money or coin, current as aforesaid, with intent to use and employ the same, or to permit the same to be used and employed in coining and making counterfeit money.

The last section of the statute authorizes the Governor, with advice and consent of the Counsel, to grant certain rewards to persons who shall inform, prosecute, and *bring to conviction* any offender who shall be guilty of forging and counterfeiting the certificates of the public debt, and the bank bills of the incorporated banks of this state; and for making and forging any false coin, as stated in the preceding sections of the statute.

In drawing complaints upon the several sections of this statute, the identical words of that part of the statute, upon which the complaint is founded, must be used in the complaint. In all complaints upon the first section, the name of the instrument forged must also be alleged in the identical words of that section; otherwise it will not appear to be an instrument which is the subject of forgery, within the statute.

In all the forms of complaints upon this statute, here following, the words, "with force and arms," are left out. They are not necessary to the validity of any complaint or indictment, unless for such offences as amount to an actual disturbance of the peace. They are never necessary when it would be absurd to use them.—3 Bac. Abr. 108, 109; 2 Hawk. 343.

The practice upon this statute has uniformly been, to consider the bank bills of the banks of other states, as "promissory notes for the payment of money," and in all prosecutions for uttering

and publishing such bills, the charge has been laid on the first section of the statute. The reason for this is, that if they are described as bank bills of the incorporated banks of other states, it will be necessary to produce on the trial, legal evidence of the incorporation of such banks, which is always difficult, and often impossible, from the great distance of the places where the banks are established. To avoid this inconvenience, the practice, as above stated, has been resorted to and sanctioned by repeated judicial decisions.

Whenever a prosecution upon this statute is brought before a justice for passing, or being possessed with intent to pass, any counterfeit bank bill or coin, every step ought to be immediately taken by the justice to identify all the bills or pieces of coin which are to be the subjects of the complaint and prosecution. In order to do this, the justice should direct the person, in whose possession he first finds them, to put his private mark on each bill and piece of coin, in his presence; so that the witness can swear to the identity of the bills or pieces of coin, at all times afterwards, into whosever hands they may subsequently pass. The trouble and expense of a number of witnesses may be frequently saved by this precaution. For if the bills or pieces of coin have no private mark upon them by which they can be identified on the trial, every person, into whose hands they may have passed, must be produced in court to swear to their identity.

Form of a Complaint for forging a Promisory Note for the Payment of Money: On the First Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, did falsely make, forge, and counterfeit, and did procure to be falsely made, forged, and counterfeited, a certain promisory note for the payment of money, purporting to be made and signed by one E. F. for the sum of dollars; which said false, forged, and counterfeit promisory note is of the following purport and effect, to wit, [*here insert a copy of the note in the words and figures of it verbatim et literatim,*] with intent him the said A. B. to injure and defraud; against the peace of said Commonwealth, and

contrary to the form of the statute in such case made and provided.* Wherefore &c.

For forging a Certificate of a Justice of the Peace.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., in the county aforesaid, laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, did falsely make, forge, and counterfeit, and did procure to be falsely made, forged, and counterfeited, a certain certificate and attestation of one E. F. Esq., one of the justices of the peace in and for the said county of S.; which said false, forged, and counterfeit certificate and attestation is of the following purport and effect, to wit, [*here insert an exact copy of the certificate, in words and figures;*] which said false, forged, and counterfeit certificate and attestation, then and there purported to be the certificate and attestation of a justice of the peace, in a matter wherein the said certificate and attestation was receivable, and might be taken as a legal proof, with intent him the said A. B. to injure and defraud; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.†

For uttering and publishing a forged Instrument: On the last Clause of the First Section of the Statute.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, had in his custody and possession a certain false, forged, and counterfeit promissory note for the payment of money, purporting to be made and signed by one E. F. for the sum of dollars; which said false, forged, and counterfeit promissory note is of the following purport and effect, to wit, [*here insert a correct copy of the forged note in words and figures;*] and that he the said C. D. the aforesaid false, forged, and counterfeit promissory

* If the note forged is for specific articles, then allege it to be "a certain promissory note for the delivery of goods," as in the words of the statute.

† It cannot be necessary to give a form for the forgery of all the different instruments enumerated in this section of the statute. The form cannot vary from those above inserted in any respect, excepting as to the denomination of the forged instrument which is to be the subject of the prosecution. In all cases, the name or denomination of the forged paper must be alleged in the words of the statute, and a correct copy of it inserted in the body of the complaint, in the manner and with the introductory words, used in the two preceding forms.

lowing purport, and effect to wit, [*here insert an exact copy of the counterfeit bill in words and figures ;*] and that he the said C. D. the aforesaid false, forged, and counterfeit, bank bill did then and there utter and tender in payment* as true, with intent him the said A. B. to injure and defraud, he the said C. D. then and there well knowing the aforesaid bill to be false, forged, and counterfeit ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a second offence in passing a counterfeit Bank Bill : On the Third Section of the Statute.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of said B., laborer, heretofore, to wit, on the day of in the year of our Lord one thousand eight hundred and at B. in the county aforesaid, had in his custody and possession a certain false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the President, Directors, and Company of the [Boston] Bank, the same being a corporation, by law licensed and authorized as a bank within this Commonwealth ; which said false, forged, and counterfeit bank bill is of the purport and effect following, to wit, [*here set forth the forged bill as it is described in the indictment or process upon which the party was convicted ;*] and that he the said C. D. did then and there utter and tender in payment as true the aforesaid false, forged, and counterfeit bank bill, with intent one E. F.† to injure and defraud, he the said C. D. then and there well knowing the aforesaid bill to be false, forged, and counterfeit ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided ; of which said offence, the said C. D., at the Supreme Judicial Court, begun and holden at B., within and for the county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and was duly and legally convicted ; and the said A. B., upon his oath aforesaid, further complains, that the said C. D. afterwards, to wit, on the day of now last past, at B. in the county aforesaid, had in his custody and possession a

* The words used in the first section of the statute are " utter and publish " ; the words in this section are " utter and tender in payment." Although there is no difference in the technical meaning of these words, yet the precise words, made use of in each section of the statute, ought to be made use of in the complaint.

† The person alleged to be defrauded in the former conviction.

certain other false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the President, Directors, and Company of the [Boston] Bank, the same being a corporation, by law licensed and authorized as a bank within this Commonwealth ; which said last mentioned false, forged, and counterfeit bank bill is of the purport and effect following, [*here insert an exact copy of the forged bill in words and figures ;*] and that he the said C. D. the aforesaid and last mentioned false, forged, and counterfeit bank bill did then and there utter and tender in payment as true, with intent him the said A. B. to injure and defraud, he the said C. D. then and there well knowing the aforesaid and last mentioned bill to be false, forged, and counterfeit against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Farm of a Complaint for bringing into, and being possessed of, within this State, a counterfeit Bill, with Intent &c.: On the Fourth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, had in his custody and possession a certain false, forged, and counterfeit bill and note, in the similitude of the bills and notes payable to the bearers thereof, issued by and for the [Boston] Bank, the same being a bank and banking company legally established within this state ;* which said false, forged, and counterfeit bill and note is of the following purport and effect, to wit, [*here insert an exact copy of the counterfeit note in words and figures ;*] and that he the said C. D. the aforesaid false, forged, and counterfeit note, in his hands, custody, and possession, then and there had and kept, for the purpose of rendering the same current as true, and with intent to pass the same ; he the said C. D. then and there well knowing the aforesaid bill and note to be false, forged, and counterfeit ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* If the forged bill be of a bank of another state, then say, " the same being a bank or banking company legally established within the state of New Hampshire."

Form of a Complaint for making or mending any Tool &c. to be used in counterfeiting Bills &c. : On the Fifth Section of the Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county of laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, did engrave, form, and make, and did begin to engrave, form, and make a certain plate, the same being an instrument and material devised, adapted, and designed for the stamping, forging, and making of false and counterfeit bills and notes in the *similitude of the bills and notes* payable to the bearers thereof, which have been issued by and for the [Boston] Bank, the same being a bank and banking company which is by law established in this state; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For being possessed of any Tool &c. to be used in counterfeiting Bills &c. : On the Fifth Section of the Statute.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. in the county aforesaid, had in his custody and possession a certain plate, engraven, devised, adapted, and designed for the stamping, forging, and making of false and counterfeit bills and notes, in the similitude of the bills and notes, payable to the bearer thereof, which have been issued by and for the [Boston] Bank, the same being a bank and banking company which is by law established in this state, with the intent to use and employ the same, and to cause and permit the same to be used and employed in forging and making such false and counterfeit bills and notes of the said Boston Bank; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

* The language of this section is somewhat incorrect and involved. It refers to the preceding section in such a manner, as to render it necessary to adopt the words of both, in forming the complaint upon each of the clauses of this section. The offence described is, for making &c. any tool or instrument devised, adapted, and designed for the forging &c. of any false and counterfeit bills or notes *which have been or shall be issued as aforesaid*, that is, *by the banks established in the state*, which, according to the literal construction, seems to imply that these banks had issued false and counterfeit bills, and that the offence here described is the making of a tool adapted and designed to counterfeit *these counterfeit bills*. By adopting the words in the fourth section, viz. "in the similitude

*Form of a Complaint for counterfeiting any Gold or Silver Coin :
On the Sixth Section of the Statute.*

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of
now last past, at B. aforesaid, in the county aforesaid, did
forge and counterfeit, and did procure to be forged and counter-
feited, and did willingly aid and assist in forging and counterfeit-
ing a certain piece of silver coin, current within this Common-
wealth by the laws and usages thereof, called a dollar ; against
the peace of said Commonwealth, and contrary to the form of
the statute in such case made and provided. Wherefore &c.

Another Form for the same, more fully set forth : On the Sixth
Section of the Statute.*

A. B. of B., in the county of S., gentleman, upon his oath
complains, that C. D. of said B., laborer, on the day of
now last past, at said B., in the county aforesaid, contriv-
ing and intending the citizens of this Commonwealth craftily,
falsely, and deceitfully to deceive and defraud, twenty pieces of
false and counterfeit coin, of copper, brass, and other mixed
metals, of the likeness and similitude of the good and legal silver
coin, current within this Commonwealth by the laws and usages
thereof, called dollars, then and there falsely and deceitfully did
forge and counterfeit, and procure to be forged and counterfeited,
and did willingly aid and assist in forging and counterfeiting ;
against the peace of said Commonwealth, and contrary to the
form of the statute in such case made and provided. Where-
fore &c.

*For being possessed of ten Pieces of counterfeit Coin, with Intent
to pass the same : On the Sixth Section of the Statute.*

A. B. of B., in the county of S., yeoman, upon his oath com-
plains, that C. D. of said B., laborer, on the day of

of the bills and notes payable to the bearer thereof," and applying them in the
manner as is done in the two next preceding forms, the language of the section
will be rendered more correct, and the meaning of it still adhered to.

* These two forms will be sufficient guides in all the cases arising under this
section. The form of the complaint will of course be easily adapted to the case ;
for instance, if the tool or instrument be a "rolling press," instead of a "plate,"
it will be so alleged ; and in like manner, if the plate be designed to counterfeit
the "certificates" of the public debt, instead of "bank bills," the complaint
will so allege the fact.

* 2 Chit. C. L. 108.

now last past, at B. in the county aforesaid, had in his custody and possession ten similar pieces of false and counterfeit coin, of the likeness and similitude of the good and legal silver coin, current within this Commonwealth by the laws and usages thereof, called dollars; and that he the said C. D., the aforesaid ten similar pieces of false and counterfeit coin did willingly aid and assist in passing and rendering current as true; and for that purpose he the said C. D., the aforesaid ten similar pieces of false and counterfeit coin, forged and counterfeited to the similitude of the silver money and coin current as aforesaid, then and there, and at one and the same time, did have and possess, with intent to utter and pass the same, knowing the same to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Form of a Complaint for being possessed of any Number of Pieces of false Coin, with Intent &c.: On the Seventh Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. in the county aforesaid, had in his custody and possession five similar pieces of false money and coin, forged and counterfeited to the likeness and similitude of the silver money and coin, current within this Commonwealth by the laws and usages thereof, called dollars; and that he the said C. D. the aforesaid five similar pieces of false and counterfeit coin, in his hands, custody, and possession, then and there had and kept, with intent to utter and pass the same as true, he the said C. D. then and there well knowing the same to be false, forged, and counterfeit; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For uttering and passing counterfeit Coin, knowing &c.: On the Seventh Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, on the day of now last past, at B. in the county aforesaid, had in his custody and possession a certain piece of false money and coin, forged and counterfeited to the likeness and similitude of the good and legal silver coin, current within this Commonwealth by the laws and usages thereof, called a dollar; and that he the said C. D.

the aforesaid piece of forged and counterfeit coin did then and there utter, pass, and tender in payment as true, with intent him the said A. B. then and there to injure and defraud, he the said C. D. then and there well knowing the aforesaid piece of coin to be false, forged, and counterfeit ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Form of a Complaint for making or being possessed of any Tool &c. to be used in counterfeiting Coin : On the Eighth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. in the county aforesaid, intending the good citizens of this Commonwealth to deceive, injure, and defraud, did cast, stamp, engrave, form, and make, and did then and there knowingly have and possess, a certain tool and instrument, devised, adapted, and designed, for the coining and making of false and counterfeit money and coin, in the similitude of the silver money and coin, current within this Commonwealth by the laws and usages thereof, called a die ; with the intent to use and employ the same, and to cause and permit the same to be used and employed, in coining and making the false money and coin as aforesaid ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.*

By a late statute of Massachusetts, passed June 14th, 1823, chap. 40, justices of the peace, and other courts, are authorized to issue search-warrants, to search for counterfeit money, securities, and tools, implements, and materials, used or to be used in the forging and counterfeiting of the same, with like power and authority which they now have to issue and grant search-warrants to search for stolen goods. See this statute, and remarks upon the construction of it, ante, p. 147, relative to search-warrants.

* This form embraces both branches of the offence which is the subject of this section, viz. the making, and also the having in possession of the tool or instrument, with the intent &c. If, upon the examination, it appears either that the party made the instrument, or that he only possessed it without having made it, but with the intent that it should be used for the purposes of forging and counterfeiting, the magistrate will be justified in committing, or binding him over for trial, upon this form of the complaint.

GAMING AND GAMING HOUSES.

GAMING, taken in any light, is an offence of the most alarming nature, tending, by necessary consequence, to promote idleness, theft, and debauchery, among the lower class. In the higher ranks of society, it has frequently been attended with the sudden ruin and desolation of the best families ; an abandoned prostitution of every principle of honor and virtue, and too often hath ended in self murder.* It is a passion to which every valuable consideration is made a sacrifice, and which, as Mr. Justice Blackstone observes, the English seem to have inherited from their German ancestors, who were infatuated with the spirit of gaming to a most exorbitant degree ; and with such a mad desire for winning or losing, that when stript of every thing else, they would stake their liberty and their very persons ; and the loser suffer himself to be bound and sold, and go into voluntary slavery.†

To restrain this pernicious practice, a great number of English statutes have been enacted from the time of Henry VIII. to the reign of George II. In Massachusetts we have two statutes, now in force, for the prevention and punishment of this shameful and degrading vice ; one to prevent gaming for money &c. ;‡ the other with a similar title, but embracing also certain provisions for the suppression of gaming houses.§ Both these statutes require revision. The penalties created by them are too inconsiderable and trifling to afford any security or protection to the public morals. They are, accordingly, constantly evaded or disregarded ; and the mischief will continue, until the punishment is altered from a trifling pecuniary penalty, to one that is corporal, and infamous. No reason can be assigned why the punishment *should not be infamous*. “ He who steals your purse steals *trash* ;” but he is thereby subjected to an infamous punishment. Shall he be thought worthy of less punishment *who steals your morals ; and with them every thing that can make life valuable and honorable ?*

* 4 Bla. Com. 171.

† Id. Tacitus de mor. Germ. 24.

‡ Stat. 1785, chap. 58.

§ Stat. 1798, chap. 20.

The following forms of complaints are drawn upon the two statutes of this Commonwealth, before referred to.

For playing at Cards, at a House of Entertainment : On the Fifth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, being a person of ill name and fame, and of idle and dissolute habits, on the day of now last past, at B. in the county aforesaid, did play with cards at a certain unlawful game, called all-fours, with one E. F., in a certain tavern and house of entertainment, there situate and kept by one G. H. ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For winning Money by Gaming : On the Third Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, being a person of ill name and fame, and of idle and dissolute habits, on the day of at B. in the county aforesaid, did play with cards, at a certain unlawful game, called all-fours, with one E. F. ; and that the said C. D., by playing at the said unlawful game with the said E. F., did then and there unlawfully win of the said E. F., at one time and sitting, and by gaming as aforesaid, more than the sum of three dollars and thirty-three cents in money, to wit, the sum of ten dollars, at the said game of all-fours ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For keeping a common Gaming House for Billiards : On the First Section of the Statute of June 27, 1798.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, being a person of ill name, and of idle and dissolute habits and manners, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, at B. in the county aforesaid, he the said C. D. being then and there, and during all the time aforesaid, an innholder and tavern-keeper in

* This form will answer for all the other unlawful games, mentioned in the section upon which it is drawn.

the said town of B., did unlawfully keep, and suffer to be kept, a table for the purpose of playing at a certain unlawful game, called billiards, in a certain house there situate, belonging to him the said C. D., and by him occupied and improved, for the purpose of lucre and gain; and on the said days and times, there, did wittingly and willingly suffer and allow divers idle and evil disposed persons to play therein at the said unlawful game of billiards, and on the days and times aforesaid did unlawfully, wittingly, and willingly suffer and allow the said idle and evil disposed persons to be and remain therein, playing and gaming at the said unlawful game, called billiards, for divers large and excessive sums of money; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*For keeping a private Billiard Table for Hire &c. : On the Second Section of the Statute.**

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, being a person of ill name and fame, and of idle and dissolute habits and manners, on the day of now last past, and on divers other days and times, between that day and the day of the exhibiting of this complaint, at B. in the county aforesaid, (the said C. D. being then and there a person not licensed as an innholder, taverner, victualler, or retailer of spirituous liquors,) did keep and suffer to be kept in a certain house and building there situate, and by him actually occupied and improved, a certain table, for the purpose of playing at an unlawful game, called billiards, for hire, gain, and reward; and did then and there, and on the days and times aforesaid, for hire, gain, and reward, there allow and suffer divers idle and evil disposed persons to resort to the same, for the purpose of playing at the said unlawful game, called billiards; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For playing at Billiards : On the Third Section of the Statute.†

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, being a person of idle and dissolute habits and morals, on the day of now last past, and on divers other days and times, both before and after, at B. in the county aforesaid, did unlawfully play at a certain unlawful game, called billiards, at a table, kept and made use of

* 2 Mass. Laws, 825.

† Stat. 1786, chap. 68; Stat. 1798, chap. 20.

for that purpose, by one E. F., (who was a person not licensed as an innholder, tavern-keeper, victualler, or retailer of spirituous liquors,) in a certain house and building there situate, by him the said E. F. actually occupied and improved ; which said table was then and there kept and maintained by him the said E. F., in the house and building aforesaid, for the purpose of playing at the said unlawful game, called billiards, and for hire, gain, and reward ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

HOUSE OF CORRECTION.

HOUSES of Correction have been established in England, by numerous statutes, many of the provisions of which, as to their regulation and government, are similar to those of this Commonwealth.* In Massachusetts, by stat. 1787, chap. 54, it is enacted, "that any justice of the peace (as well as the Court of Sessions) may send and commit unto the said house (of correction), to be kept and governed according to the rules and orders thereof, all rogues, vagabonds, and idle persons, going about in any town or place in the county, begging ; or persons using any subtle craft, juggling, or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found ; common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common night-walkers, pilferers, wanton and lascivious persons, in speech, conduct, or behavior ; common railers or brawlers, such as neglect their callings and employments, mispend what they earn, and do not provide for themselves, or the support of their families, upon conviction of any of the offences or disorders aforesaid, complaint thereof having been made in writing ;" and by section sixth of the same statute, justices of the peace are authorized to send to the house of correction Africans or Negroes, who are not citizens of

* 1 Chit. C. L. 655, Riley's Ed.

the United States, who remain within the state for a longer time than six months.

Further provision, in addition to this statute, was subsequently made by statute 1797, chap. 62. That part of it, which relates to the duty of justices of the peace, provides for the confinement, in the house of correction, of lunatics, and dangerous madmen, and is in the following words. "Sec. 3. Be it further enacted, that when it shall be made to appear to any two justices, *quorum unus*, that any person, being within their county, is lunatic, and so furiously mad as to render it dangerous to the peace or safety of the people for such lunatic person to go at large, the said justices shall have full power, by warrant under their hands and seals, to commit such person to the house of correction, there to be detained, till he or she be restored to [his] right mind, or otherwise be delivered by due course of law."

By another statute, 1802, chap. 22, further provision is made relative to the government and management of houses of correction, and authorizing the Supreme Judicial Court and Court of Sessions, (now the Court of Common Pleas,) to sentence convicts to imprisonment, either in the common gaol, or house of correction; but this statute contains nothing in relation to the duty of justices of the peace.

The last statute, upon the subject of rogues, vagabonds, &c. to be punished in the house of correction, was passed February 10th, 1823, chapter 88, and contains new and important provisions relative to the office and duty of justices of the peace; by the first and second sections of which it is enacted, "that when any person shall be accused of any of the offences or disorders described in the act, entitled 'an act for the suppressing and punishing of rogues, vagabonds, common beggars, and other idle, disorderly, and lewd persons,' or shall, by virtue thereof, or of any other act in force within this Commonwealth, be liable to be committed to the house of correction in any county, or to the workhouse, which is now, or hereafter may be established in any town or city, complaint shall be made in writing, and under oath, to some justice of the peace in the county wherein such offence or disorder shall be committed, or to the Police Court of the city

of Boston, if the offence or disorder be therein committed ; and such justice, or court, shall cause the party, so complained of, to be brought before him, by warrant or otherwise ; and if, upon a hearing and examination of the matter set forth in the complaint, the allegations therein shall be proved to be true, they may order, direct, and sentence the person or persons so convicted, to be committed to the house of correction, or work house, or house of industry, as the case may be, within the county, town, or city, there to be put to hard labor, according to the rules and regulations which are, or may be lawfully established for the government of such houses, for a term not exceeding six months ; and the party so committed shall be liable to all the restraints and penalties authorized by any of the acts aforesaid." " And any party, who shall be convicted and sentenced as aforesaid, may, if he or she deny the charges, and put him or herself upon trial, appeal to the next Court of Common Pleas within the same county, or if in the city of Boston, to the next Municipal Court therein, and have a trial by jury in due course of law, upon recognising, with sufficient surety or sureties, in the court where he or she shall be convicted, in such reasonable sum as shall be ordered by such court, with condition, that he or she enter and prosecute said appeal, in like manner as other appeals from a justice of the peace, or the Police Court, are entered and prosecuted ; and to abide the sentence of the court appealed to thereon, and in the mean time to keep the peace and be of the good behavior toward all the citizens of said Commonwealth ; and the commission of the like offence, before judgment or the appeal by the principal in such recognisance, shall be deemed and taken to be a breach of the conditions of the same recognisance." By the second section of this statute it is further enacted, " that if any person shall be found committing either of the offences or disorders enumerated in the acts herein referred to, in the public streets or roads, in the night time, any such person may be apprehended by any magistrate, constable, watchman, or by any citizen by order of any such officers, and kept in custody in any convenient place for the space of twenty-four hours, at or before

the expiration of which time any such person shall be carried before a justice of the peace, or the Police Court, as the case may be, and there proceeded against, as is provided in the foregoing section, or discharged, as the said justice or court shall determine." By the third section of this act, provision is made for the discharge of such persons as are reformed; and also, that if such person, so discharged, shall be convicted of a second offence, the justice, or court before whom the second conviction shall be had, may sentence such person to hard labor in the house of correction or work house, or house of industry, for a term not exceeding one year, or to imprisonment in the common gaol for a term not exceeding six months. By the fourth section of this act, all former laws, which are repugnant to, or inconsistent with the provisions of this act are repealed.

By the provisions of this statute, the offences and disorders, intended to be punished, must be proceeded with in the same manner as is required in other criminal prosecutions before a magistrate; that is, the charge must be in writing, made under oath, the offence sufficiently and technically described; the warrant must have the formalities required in all other cases, and the record of the conviction, and all subsequent proceedings be the same as in other criminal cases. The proceedings upon the former statutes have heretofore been *summary*; some of which have been declared, by the higher judicial authorities, to be unconstitutional; and persons committed to the house of correction without a compliance with the common and constitutional requisites in a criminal prosecution, have been discharged upon *habeas corpus*. It is probable that this circumstance gave birth to the recent statute upon this subject.

The following are forms of complaints for some of the offences intended to be punished by the above mentioned statutes. Several of the offences, or *disorders*, therein described, are of so vague and indefinite a nature, that it might be difficult to frame such a charge or complaint upon them, as could be supported by the strict rules required to be adhered to in criminal accusations.

Complaint against a common Drunkard.

A. B. of &c. upon his oath complains, that C. D. of in the county of laborer, at B. aforesaid, in the county aforesaid, was and is a common drunkard, and on divers days and times between the day of now last past, and the day of exhibiting this complaint, at B. aforesaid, was drunk and intoxicated by the excessive use of spirituous liquor ; against the peace of said Commonwealth, and contrary to the form of the several statutes in such cases made and provided. Wherefore &c.

Against a common Piper and Fiddler.

A. B. of &c. upon his oath complains, that C. D. of in the county aforesaid, laborer, was and is a common piper and fiddler, and that he the said C. D. at B. aforesaid, in the county aforesaid, on divers days and times between the day of and the day of exhibiting this complaint, with a certain musical instrument, called a did make divers noises and disturbances, to the great injury, disturbance, and disquiet of divers good and peaceable citizens of said Commonwealth ; against the peace of said Commonwealth, and contrary to the form of the several statutes in such cases made and provided. Wherefore &c.

Against a Vagabond and Idle Person.

A. B. of &c. upon his oath complains, that C. D. of in the county of laborer, is, and for thirty days last past has been, a vagabond and idle person, going about in the town of in the county aforesaid, from place to place, begging ; against the peace of said Commonwealth, and contrary to the form of the several statutes in such case made and provided. Wherefore &c.

Against a Person for Juggling, or using any subtle Craft

A. B. of &c. upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, at B. aforesaid in the county aforesaid, was and is a person using a certain subtle craft, juggling, and unlawful games and plays, to wit, certain games and plays called and that he the said C. D. on the said day of in the year aforesaid, at B. in the county aforesaid, and on divers other days and times, between that day and the day of exhibiting this com-

plaint, did subtly and craftily juggle, gamble, and play at the said unlawful game and play, called with divers persons to the said complainant unknown, for the purpose and with intent to obtain the moneys and property of the said persons unknown, by craft, juggling, and unlawful games and plays; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a common Night Walker.

A. B. of &c. upon his oath complains, that C. D. of &c. [addition] on the day now last past, at B. aforesaid, was and is a common night walker, and from the said day of to the day of the filing of this complaint, during divers nights within the time aforesaid, did walk and ramble in the streets and common highways in the said town of at unseasonable hours of said nights, without having any lawful business, and without any necessity therefor; against good morals and good manners; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a wanton and lascivious Person.

A. B. of &c. upon his oath complains, that C. D. of in said county, laborer, on the day of now last past, and on divers other days and times, between that day and the day of filing this complaint, was and is a wanton and lascivious person, and on the said days and times, at B. aforesaid, did utter certain lewd, indecent, wanton, and lascivious expressions, in the hearing and presence of divers good and worthy citizens of said Commonwealth, and did then and there wantonly and lasciviously expose to view the private parts of the body of him the said C. D., and did then and there, and on the days and times aforesaid, otherwise wantonly and lasciviously misbehave and conduct himself; against good morals and good manners; against the peace of said Commonwealth, and contrary to the form of the several statutes in such cases made and provided. Wherefore &c.

Form of a Sentence to the House of Correction.

Suffolk ss.

At a Justice's Court, held before me, A. B. Esq., &c. at
on &c.—Be it remembered, that C. D. of

&c. is brought before me the said justice, by virtue of a warrant duly issued, upon the complaint on oath of E. F. &c. wherein the said E. F. charges the said C. D. [*here insert the body of the complaint,*] which complaint being read and heard by the said E. F., he the said E. F. is asked by me the said justice, whether he is guilty or not guilty, who saith that he is not guilty; but after hearing divers credible witnesses duly sworn to testify the whole truth, and fully hearing the defence of the said E. F. it appears to me the said justice, that he is guilty.—It is therefore considered and ordered by me the said justice, that the said E. F. be committed to the house of correction in B. aforesaid, in the county aforesaid, there to be put to hard labor, according to the rules and regulations established for the government of said house of correction, for the term of days.

HOUSES OF ILL FAME, AND OTHER DISORDERLY HOUSES.

KEEPING a house of ill fame, and encouraging suspicious and disorderly persons to resort thither, is an offence at common law, and punishable with fine and imprisonment.* Evidence of particular instances of illicit intercourse may be given under the general charge; it is not however necessary to prove who frequents the house, for that may be impossible; and if any unknown persons are proved to be there, behaving in a disorderly manner, it is sufficient to support the charge.†

It has been decided, that if a person be only a lodger, and make use of her room for disorderly purposes, she would be guilty of keeping a house of ill fame, as much as if she were the proprietor of the whole house.‡ And also, that a wife, as well as a husband, may be indicted for *keeping* a disorderly house; because the charge does not respect the *ownership*, but the *disorderly management* of the house.§

* Hawk. b. 1, c. 74.

† 1 T. R. 754.

‡ 2 Lord Raym. 1197; 1 Salk. 382.

§ 1 Salk. 384.

Form of a Complaint for keeping a House of ill Fame.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, at B. in the county aforesaid, did keep and maintain, and yet doth keep and maintain a certain common, ill-governed, and disorderly house; and in the said house, for his own lucre and gain, certain persons, as well men as women, to frequent and come together, then, and on the said other days and times, there unlawfully and willingly did cause and procure; and the said men and women, in the said house, at unlawful times, as well in the night as in the day, then, and on the said other days and times, there to be and remain, drinking, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and still doth permit, to the great damage and common nuisance of all the peaceable citizens of the said Commonwealth there residing, inhabiting, and passing, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For keeping a disorderly House.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, at B. in the county aforesaid, a certain common, ill-governed, and disorderly house unlawfully did keep and maintain; and in the said house, for his own lucre and gain, certain evil disposed persons, as well men as women, of evil name, fame, and conversation, to come together, on the days and times aforesaid, there unlawfully did cause and procure; and the said persons, in the said house, at unlawful times, as well in the night as in the day, on the days and times aforesaid, there to be and remain, drinking, tipling, cursing, swearing, quarrelling, and otherwise misbehaving themselves, unlawfully did permit and suffer; to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing, inhabiting, and passing, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

See NUISANCE, where these precedents are inserted a second time.

LARCENY AND ROBBERY.

LARCENY or theft is the most common offence which the cupidity or profligacy of mankind has tempted them to commit. It has been punished with more or less rigor by the Jewish, Roman, English, and American codes. It has been treated of with great minuteness and at great length, by the modern English writers upon the law of crimes. In East's Pleas of the Crown, it occupies nearly two hundred and seventy pages of a quarto volume. And in a late compilation, or digest of the criminal law, by an English barrister of the name of Russell, it has been treated of at still greater length, and with great precision.

Nothing more can here be attempted, than an outline of the essential principles and material branches of the offence. These, however, may be of use to those magistrates who cannot have convenient access to the voluminous and expensive works from which they are selected. This outline is drawn from the principles and practice of the common law, and from the American decisions and statutes.

It is to be observed, that this offence is, in its nature, intimately connected with that of robbery, the one being included in the other; and they are also blended together by the statute law; which leads to a joint consideration of them in several particulars.*

Larceny is divided into two branches, *simple* and *compound*. The first is called simple, because it is unaccompanied with any other atrocious circumstance; the other is called compound, because it includes in it the aggravation of taking from one's house or person.† The English lawyers and judges have not agreed upon a precise definition of simple larceny. In Blackstone,‡ it is said to be "the felonious taking and carrying away of the personal goods of another." East has *his* definition, which is much more full, and though it may be more correct, it is more clumsily expressed.§ But according to all definitions of it,

* 2 East, P. C. 552.

† 4 Bla. Com. 229.

‡ Id.

§ 2 East, P. C. 553.

the following things are necessary to constitute the offence.

1. There must be a *taking*.
2. There must be a *carrying away*.
3. This taking and carrying away must be with a *felonious intent*.
4. It must be of the *personal goods of another*.
5. Without the consent, or against the will of the owner.

1. There must be an actual *taking* or severance of the thing from the possession of the owner ; for as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he cannot be guilty of a felony in carrying them away.* Thus if a man find goods, and convert them to his own use, this is no larceny ; and the same rule holds, where the party is intrusted with the goods for a specific purpose, so that he is invested with a temporary property in them ; but if he severs part of them for the purpose of taking, he destroys the privity of the bailment, and commits a new trespass, which makes his offence complete.† As if a load of goods, consisting of several packages, be delivered to a common carrier to be transported to a certain place, and he fraudulently take one of the packages and convert it to his own use before they arrive at the place of destination, it is felony.‡

In order to determine whether a particular or fraudulent appropriation of goods, intrusted to another, will amount to larceny, it will be often necessary to inquire whether the owner parted with *the property* in his goods, or only with the actual possession of them. Thus a servant who takes care of the goods of his master, a guest who has valuable property to use at an inn, have manifestly no interest in them, and may be said with propriety to *take* them.§ If a tradesman intrusts goods to his servant to deliver to his customer, and he appropriates them to himself ; if a person, employed to drive a team to a certain place, drive to another place, and fraudulently take the whole load and convert it to his own use, it is felony in both cases ; for the property still

* Hawk. b. 1, c. 33, s. 2 ; 2 East, P. C. 554.

† Hawk. b. 1, c. 33, s. 2 & 4.

‡ 4 M. R. 580, *Commonwealth v. Brown*.

§ Hawk. b. 1, c. 33, s. 6.

remains in the constructive possession of the owner.* But though there must be a taking from the actual or constructive possession of the owner, it is not necessary that it should be done by the hand of the party accused; for if he procured an innocent agent, as a child or lunatic, to take the property; or if he obtained it from the sheriff by a replevin without color of title, and with a felonious design, he will himself be a principal offender.† In like manner, though the possession be delivered by the owner, yet if it be obtained by any fraud, it amounts to a tortious taking, as much as if the party had taken it without any delivery on the part of the owner.‡ Under some circumstances a man may be guilty of larceny in taking his own goods; as if he steals them from a pawn-broker, or any one to whom he has delivered and intrusted them, with intent to charge such person or bailee with the value.§

2. There must be a *carrying away*. The least removal of a thing, from the place where it was before, is a sufficient asportation, or carrying away, though it be not quite carried off. As the taking off the sheets from the bed, and carrying them into another apartment, by a guest, who was apprehended before he could get out of the house; this was adjudged larceny. So also where a person, having taken a horse in a close with intent to steal it, was apprehended before he could get out of the close.|| Such also was the case of him, who, intending to steal plate, took it out of the trunk where it was deposited, but was surprised before he could move it.¶ So where the prisoner took up a parcel in a waggon, and carried it from one end of the waggon to the other, with intent to steal it, although it was never taken out of the carriage, but he was seized in the fact, this was adjudged a sufficient asportation to constitute a felony.** The same rule is applicable to all cases where thieves have removed goods in a shop from the shelves to the floor, and are surprised in the act of packing them.

* 1 Leach, 251; 4 M. R. 580; 8 M. R. 518, *Commonwealth v. Baldwin*.

† Hawk. b. 1, c. 83, s. 8. ‡ 2 East, P. C. 554.

§ 4 Bla. Com. 231; Fost. 123, 124. || 2 East, P. C. 555. ¶ Id. 556.

** 2 East, P. C. 556.

But setting a package upright in the same place, when it was lying lengthwise, it not being entirely lifted off the spot; the taking of a purse out of the owner's pocket, to which it still continued fastened by a string, or if, in struggling, the purse fall to the ground, the robber not having hold of it; these are cases in which it has been adjudged that there was not such a carrying away of the property as to constitute larceny.*

But a momentary possession, though lost again the same instant, the thing being found about the owner's person, is sufficient; as was the case of him who snatched a diamond ear-ring, and tore it from the ear of a lady as she was coming out of the theatre, but the ear-ring fell into her hair, where it was found after she returned home; it was the opinion of all the judges, that it being in the possession of the prisoner for a moment, and by violence separated from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant.† If the thief once take possession of the thing, the offence is complete, though he afterwards return it. As if a robber, finding little in a purse which he had taken from the owner, restore it to him again, or let it fall in struggling, and never take it up again, but having once had possession of it.‡

3. The taking and carrying away must also be with a *felonious intent*. If a servant takes his master's horse, without his knowledge, and brings him back again; if a neighbor takes another's plough, which is left in the field, and uses it upon his own land, and then returns it; these are misdemeanors and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party does it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny, the variety of circumstances are so great, that it is impossible to recount them; they must therefore be left to the consideration of the court and jury.§

* 2 East, P. C. 556; 1 Hale, 508 & 533.

† 2 East, P. C. 557; 1 Leach, 360, Lapier's case.

‡ 2 East, P. C. 557; 1 Hale, 533. § 4 Bla. Com. 232.

No larceny will be committed, when the goods are taken on a claim of right, however unfounded ; as, if the owner of land takes cattle doing damage, though no real title exists, he will only be liable to an action.* But if there be no pretence or color of title, and the property be obtained under a fraudulent legal process, the offence is thereby rather aggravated than reduced.†

A finding and subsequent conversion of property will not amount to a felony. But if the goods are found in the place where they are usually suffered to lie, as a horse on a common ; or money in a place where, it clearly appeared, the thief knew the owner had concealed it, the taking will be felonious. So if a parcel be left in a hackney coach, and the driver open it, not merely from curiosity, but with a view to appropriate a part of its contents to his own use, he will be guilty of felony.

A person cannot be guilty of a felonious taking of property, who has the excuse either of insanity, ideocy, coverture, or infancy. Tenants in common, or joint-tenants of a chattel, cannot be guilty of stealing the same from each other, because the property and possession is in both. But as has been shown, a man, under some circumstances, may be guilty of stealing his own goods from the person of another. So he may be an accessory, after the fact, to such larceny, by harboring the thief, or assisting his escape.‡

A feme covert cannot commit larceny of her husband's goods from his own possession, because in law they are considered as one person, and she has a kind of interest in them ; on which account not even a stranger can commit larceny of such, by the delivery of the wife, although he knew they were the husband's goods.§

Neither can the wife commit larceny in the company of her husband, for it is deemed his coercion, and not her own voluntary act. Yet if she do it in his absence, and by his mere command, she is punishable as if she were sole. But the husband and wife may be indicted for a larceny committed in company of each other, and if the husband be convicted, the wife will

* 1 Hale, 506, 507. † Id.

‡ 2 East, P. C. 558.

§ Id.

be acquitted ; but if the husband be acquitted, and it appear that the felony was by her own voluntary act, of which the husband had no knowledge, and in which he had no participation, she may be convicted.*

The most difficult part of the subject consists in deciding at what time the felonious intent was conceived, in those cases where the defendant had the actual custody of the goods. But this point can only arise when he had not the property, but only the mere possession of the articles in question. For it is certain, that if the property in effects be voluntarily parted with, whatever false pretences were used to obtain it, no felony can have been committed.† Thus, if a horse-dealer deliver a horse to another on his promise immediately to pay for it, on which he rides off and does not return, this is no felony, for there was an actual sale completed.‡ If a sale of goods is not completed, and the pretended purchaser absconds with them, and, from the first, his intention was to defraud, he is guilty of stealing.§ In numerous other cases of the same kind, the law is the same.

In all cases where a voluntary delivery of the goods is the defence relied on, two questions arise. First, whether the property was parted with by the owner. Secondly, supposing it were not, whether the prisoner, *at the time he obtained it*, conceived a felonious design. In the following cases, the property being in the prosecutor, and the possession in the defendant, it depended on the original intent, whether the latter was guilty of a felony, or a mere breach of confidence. Thus, where a house was burning and a neighbour took off some of the goods, as if to save them from the flames, and afterwards converted them to his own use, it was held no felony, because the jury thought the original design honest.|| On the other hand, where the defendant obtained a horse, under pretence of hiring it for a day, and immediately sold it, he was holden guilty of felony, because the jury found that he acted with a *felonious intent* in making the con-

* 1 Hale, 45 ; 2 East, P. C. 559 ; 1 M. R. 476, *Commonwealth v. Trimmer & al.*

† 1 Hale, 506. ‡ 1 Leach, 467. § 1 Leach, 92. || 1 Leach, 411.

tract.* So where a person hired a post-chaise for an indefinite length of time, and converted it to his own use, he may be convicted of larceny, if his original intent were felonious.† And if corn be sent to a miller to grind, and he takes a part of it, he will be guilty of felony, because there is a severance which constitutes a trespass, and a felonious conversion.‡

4. The taking must be of the *personal goods of another*; for if they are things *real* or savor of the realty, larceny, at the common law, cannot be committed of them. And of things, also, that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny can be committed by the rules of the common law. But if the thief severs them at one time, and comes again at *another* time, after they are so severed and turned into personalty, and takes them away, it is larceny; and so it is, if the owner or any one else has severed them.§

Larceny cannot be committed of such animals as are wild and unreclaimed, such as deer, hares, beavers, &c. in a forest; fish in an open river or pond, or wild fowls at their natural liberty;|| but if they are reclaimed or confined, or killed for use, it is otherwise. As to those animals which do not serve for food, and which, therefore, the law considers of no intrinsic value, as dogs, and other creatures kept for whim or pleasure, though a man may maintain a civil action for them, yet they are not of such estimation as that the stealing of them amounts to larceny.¶

Larceny may be committed of the property of a person unknown, and an indictment will lie for stealing the property of a person unknown.** Stealing the shroud or clothes from a grave, is also felony at common law.††

In addition to the foregoing principles of the common law, it is to be remembered, that with respect to what things, or species of personal property, larceny may be committed, every government has its own statute provisions. Accordingly, in England, there are a great number of statutes made for this purpose, enumerating the particular kinds of property which are the subjects of larceny.

* 1 Leach, 212. † Id. 420. ‡ 1 Rol. Abr. 73.

§ 4 Bla. Com. 238; 1 Hale, P. C. 510. || 4 Bla. Com. 235; 1 Hale, 511.

¶ 4 Bla. Com. 236.

** 1 Hale, 512.

†† 4 Bla. Com. 236.

The statute of this Commonwealth, upon the same subject,* specifies all the articles and kinds of personal property which can be the subject of larceny in this state. As every magistrate is probably in the possession of this statute, it will be wholly unnecessary to enumerate them in this place. As the several species of property mentioned in it, are what the legislature have thought it necessary to protect from depredation by a peculiar sanction, it follows that no other species of property, not mentioned in the statute, can be the subject of larceny.

5. The taking must be *against the will of the owner*. But if the owner, in order to detect a number of men in the act of stealing, directs a servant to appear to encourage the design, and lead them on till the offence is complete, it is said that, so long as he did not induce the original intent, but only provided for its discovery after it was formed, the criminality of thieves will not be destroyed.† In like manner, if a man is suspected of an intention to steal, and another, to try him, leaves property in his way, which he takes, he is guilty of larceny. And if, on thieves breaking in to plunder a house, a servant, by desire of his master, show them where the plate or other valuable article is kept, which they remove, this circumstance will not affect the crime.‡

Compound or mixed larceny is such as has all the properties of the former, or simple larceny, but is accompanied with the aggravation of a taking from the *house* or *other building* mentioned in the statute, or from the *person*. Larceny from the house or other building has a higher degree of guilt than simple larceny, and is deservedly punished with greater severity. Larceny from the *person* is either by stealing *privately*, or openly *without force and violence*, or by open and violent assault, which is *robbery*.

The statute of this Commonwealth§ punishes larcenies committed in dwelling-houses, and certain other buildings, and vessels lying within the body of the county, in the following instances.
1. Larcenies committed in the night time, by breaking and entering any shop, ware-house, or office, not adjoining to, or occupied

* Stat. 1804, chap. 143.

† 2 Chit. C. L. 920 ; 2 Leach, 913. . ‡ Id. 922.

§ Stat. 1804, chap. 143.

with a dwelling-house, or any ship or vessel lying within the body of a county. 2. For entering in the night time without breaking, or in the day time for breaking and entering any dwelling-house or out-house thereto adjoining, and occupied therewith, or any office, shop, ware-house, ship or vessel, the owner or other person being therein and put in fear. 3. For committing any larceny in the day time, in any dwelling-house, ship or vessel; or for breaking and entering in the night time any church, meeting-house, court-house, town-house, college, or academy, or other building erected for public uses, or any mill, malt-house, store, barn, or stable.

The offence of privately stealing from a man's person, as by picking his pocket without his knowledge, or as it is expressed in the statute, "privily and fraudulently," is the other species of compound larceny not amounting to robbery, because not accompanied with force and violence. Also, a larceny from the person, committed openly and violently, yet under circumstances not amounting to robbery, is another instance of compound larceny, recognised and punished by the statute. With respect to these two kinds of larceny from the person, it is said that any sort of secret or sudden taking from the person, without putting him in fear, and without terror or open violence, seems within the statute, though some small force be used by the thief to possess himself of the property, provided there be *no resistance by the owner* or injury to his person, and the circumstances of the case show, that the thing was taken, not so much against, as without the consent of the owner.* The following are some of the cases probably contemplated by the framers of the statute. Snatching the hat from the head of a person walking in the street; snatching a bundle or umbrella, from the hands of a woman, and running away with it; taking a person's watch out of his pocket while sleeping, by which the owner was waked &c. In all these cases a degree of force must have been used, but the taking was rather by means of the surprise or slight of hand, than by open violence and terror. And it is said that this species of larceny seems to form a middle

* 2 East, P. C. 701, 702; 7 M. R. 242, *Commonwealth v. Humphries*.

case between privately stealing from the person, and a taking by open force and violence.*

The following rules and principles of law are to be strictly followed in drawing complaints for larceny. 1. As to the *venue*. As the property in the goods stolen always remains in the true owner, unaltered by the tortious taking, every asportation or removal of it is, in law, a new trespass. Hence it follows that the venue may be laid in any county into which the goods are conveyed.† Stealing goods in any other of the United States, and bringing them into this state, is larceny in this state upon the same principle.‡ 2. As to the *description* of the property stolen. The *kind* of property stolen must be correctly stated in the complaint. A complaint for stealing bank bills, if it merely describe them as such, is sufficient without setting them forth.§ A promissory note may be described as a promissory note for the payment of money, or the sum for which it was given.|| When the article stolen is cash, it should be averred to be "of the moneys;" and although this may not be *necessary*, it is conformable to ancient practice and precedents. The *number* of things stolen should also appear; and where the things stolen are of different kinds, the quantity of each kind ought to be stated. The *value* of each article must also be expressed, that it may appear upon the record, whether the offence is cognizable by a justice of the peace, the Court of Common Pleas, or exclusively in the Supreme Judicial Court. 3. The description of the owner. Wherever this is known, the property must be expressly laid in him. A special property in the goods stolen is sufficient for this purpose. A carrier, or person to whom goods are pawned or bailed, may be described as owner.¶ So may a laundress who has them to wash. An innkeeper from whom the goods of his guest are stolen. Clothes &c. provided for children, may be described as belonging to them or to their father.** When the

* 2 East, P. C. 702, 703; 1 Leach, 224, Baker's case.

† 1 Hale, 507, 508; Hawk. b. 1, c. 83, s. 52; 1 Mass. Rep. 116; 2 do. 14; 10 do. 154.

‡ Id. Ibid. § 1 Mass. Rep. p. 336. || 1 Leach, 253, 513; 2 Leach, 1103.

¶ 1 Hale, 512. ** 1 Leach, 463.

owner of the property cannot be ascertained, a complaint, alleging the property to belong to certain persons unknown, will be good—2 Hale 181—and in all cases of larceny in dwelling-houses and other buildings, the name of the owner of the premises must be truly stated—2 Hale 244—and numerous cases in 1 Leach.

ROBBERY.

ROBBERY is a felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by force and violence, or by other assault, and putting him in fear.* This definition, taken from East's Pleas of the Crown, is enlarged by adding to the words, "or other assault," taken from our statute.† Some of the points relative to this offence have been before stated; such as, What is a taking, of what goods, and with what intent, &c. There are two material questions remaining, as to the nature of this offence. First, What is a taking from the person? Secondly, What degree of violence or putting in fear is necessary?

As to the first, it is sufficient if the property be taken in the presence of the owner; it need not be taken directly from his person, if the taking be accompanied with violence to his person, or putting him in fear.‡ As where a robber assaults another, and takes away his horse standing by him; or, having put him in fear, drives his cattle out of his pasture, in his presence, or takes up his purse, which he had in his fright thrown into a bush, or his hat, which had fallen from his head.§

As to the second question, to wit, what violence or fear is necessary; if the robbery be committed, either by violence or by putting in fear, it is sufficient to constitute the offence; and if either of these facts be laid in the indictment, it is enough.||

* 2 East, P. C. 707. † Stat. 1804, chap. 143. ‡ 2 East, P. C. 707.

§ Id.; Hawk. b. 1, c. 84, s. 5; 4 Bla. Com. 242.

|| 2 East, P. C. 708; 7 M. R. 242, Commonwealth v. Humphries.

As to the sort of violence necessary to be proved, no sudden taking of a thing unawares from the person, as by snatching a hat from the head, is sufficient to constitute robbery; but there must be some injury done to the person, or some grievous struggle for the possession of the property. There are numerous cases in the books, in which the law, as to the nature of the force and violence which constitute a robbery, has been explained and settled.—See 2 East's Pleas of the Crown, p. 709, 710, &c. for these cases.

Robbery may also be committed by putting in fear as well as by force. Yet it is not necessary that actual fear should be strictly and precisely proved, provided the property be taken with such circumstances of violence, or terror, or threatening, by word or gesture, as would in common experience induce a man to part with it, from an apprehension of personal danger; for the law will presume fear where there appears a reasonable ground for it.* If a man be knocked down without previous warning, and stripped of his property while senseless, he cannot be said to be put in fear, yet this would unquestionably be a robbery. So a colorable gift, extorted by fear, as with a drawn sword, is obtaining the property through fear. Where a person assaulted a woman, with intent to commit a rape, and she, without any demand from him, offered him money to desist, which he took, but continued his violence to effect his original purpose, till he was interrupted by another person; this was holden to be robbery by a majority of the judges.†

The precise nature of the fear is an inquiry more difficult, because nowhere defined by the writers on criminal law. The exact line in this case cannot be drawn, and has not been attempted. All that can be said upon it is, that, on the one hand, this fear is not confined to bodily danger; and, on the other, it must be of such a nature as in reason and common experience is likely to induce a man to part with his property against his will; and to deprive him of the power of exercis-

* 1 Hale, 533, 534; 4 Bla. Com. 243; 2 East, P. C. 711.

† 2 East, P. C. 711, 712.

ing it, through the influence of the terror impressed ; in which case, fear is considered to supply the place of force.* There are a great number of particular cases referred to in East's Pleas of the Crown, and other writers, which have been decided in England ; the object of which is to show the nature of the fear which is necessary to constitute the offence of robbery. They are too numerous to be here inserted ; but they show the true nature of this fear. Of this description are the following. A person obtained money from another, by force of a threat to carry him before a magistrate and accuse him of an unnatural crime ; this has been adjudged robbery.† Threatening to bring a mob, and burn down the prosecutor's house, if he did not give the prisoners money, which he did, under the influence of that threat, held robbery.‡ Where there is no force used, there must be an actual terror felt at the time ; and it is not enough that the fear arise *after* the property is taken. For if a person privately steals money from another, and afterwards keeps it by putting him in fear, this is no robbery.§

Robbery has been a capital offence in this state,|| until the passing of the statute of 1804, chap. 143, when the punishment was reduced to confinement to hard labor for life in the state prison. By a late statute, 1818, chap. 124, a robbery, when the offender is armed with a dangerous weapon, and the assault is made with intent to kill or maim the person assaulted, or when the robber being armed with a dangerous weapon, shall actually strike or wound the person assaulted and robbed, is punished with death. In a late case of the Commonwealth *v.* Michael Martin, 17 M. R. 359, will be found a learned and important exposition of this statute by Parker C. J.

The following forms of complaints for larceny are drawn upon the several sections of the statute of Massachusetts for the punishment of larceny and robbery.

For simple Larceny : On the First Section of the Statute.

A. B. of B., in the county of S. yeoman, upon his oath complains, that C. D. of in the county of laborer, on

* 2 East, P. C. 713.

† Id. 715.

‡ Id.

§ 4 Bla. Com. 242.

|| 1 Mass. Laws, 226.

the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver spoon, of the value of five dollars, of the goods and chattels of him the said A. B., then and there in the possession of said A. B. being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For breaking and entering a Shop in the Night, and committing a Larceny therein: On the Fourth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the shop of him the said A. B. there situate, in the night time, did break and enter, and certain bank bills, amounting together to the sum of one hundred dollars, and of the value of one hundred dollars, and [here insert all the articles stolen, alleging the kind, number, and value of each,] of the goods and chattels of the said A. B. then and there in the shop aforesaid being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.† Wherefore &c.

For breaking and entering a Vessel in the Night Time and committing a Larceny therein: On the Fourth Section of the Statute.

A. B. of B., in the county of S., mariner, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain vessel of him the said A. B., called the Sally of Boston, within the body of the said county of S., then and there lying and being, in the night time, did break and enter, and one trunk of the value of five dollars, and [here state the kind and

* In complaints for stealing any of the articles mentioned in this section of the statute, the description of the article must follow the precise words of the statute; as, "a promissory note for the payment of money given for the sum of \$," "a certain deed and writing, containing a conveyance of lands," &c. If the article stolen be money, say, "sundry pieces of silver coin, current within this Commonwealth, amounting together to the sum of five dollars, of the moneys of him the said A. B."

† The same form is to be adopted for a larceny in a ware-house, or office, not adjoining to, or occupied with a dwelling-house.

value of each article,] in the trunk aforesaid then and there contained, and in the vessel aforesaid then and there being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For entering a Dwelling-House in the Night Time, without breaking, the Owner being therein, and put in fear: On the Fifth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of him the said A. B. there situate, in the night time did enter, without breaking the same, he the said A. B., his wife, and divers others of his family, in the dwelling-house aforesaid, and in the peace of the said Commonwealth, then and there being, and in bodily fear and danger of his and their lives, by him the said C. D. being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For breaking and entereng a Dwelling-House in the Day Time, the Owner being therein, and put in fear: On the Fifth Section of the Statute.

A. B. of B, in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the dwelling-house of him the said A. B., there situate, in the day time did break and enter, he the said A. B., his wife, and divers others of his family, in the dwelling-house aforesaid, and in the peace of said Commonwealth then and there being, and in bodily fear and danger of his and their lives, by the said C. D. being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such cases made and provided. Wherefore &c.

* If there are more than one owner of the vessel, the names of all of them must be inserted in the complaint; and if the property stolen be a part of the cargo, and owned by several persons, the name of each owner of the property must be truly inserted. In all cases of this kind, the allegations of ownership must be according to the fact.

For breaking and entering an Out-House, adjoining a Dwelling-House &c., in the Day Time, the Owner being therein, and put in fear: On the Fifth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain out-house, called a wood-house, adjoining to and occupied with the dwelling-house of him the said A. B., there situate, in the day time did break and enter, he the said A. B., his wife, and divers others of his family in the said dwelling-house, and in the peace of the said Commonwealth, then and there being, and in bodily fear and danger of his and their lives, by the said C. D. being then and there feloniously put; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For committing a Larceny in the Day Time, in a Dwelling-House: On the Sixth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, two sheets of the value of six dollars, one surtout-coat of the value of ten dollars, and one hat of the value of five dollars, of the goods and chattels of him the said A. B., then and there in the dwelling-house of him the said A. B. being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.† Wherefore &c.

† Similar forms are to be adopted for breaking and entering in the day time the other buildings, ships, or vessels, mentioned in this section, following the description of the buildings or vessels as in the statute. It will be remarked, that it is *not necessary that any larceny should be committed* in those buildings or vessels, in order to bring the offence within this section, although the offence is there denominated a *felony*.

* If the goods stolen belong to one person, and the dwelling-house in which they are stolen belongs to another person, it must be so alleged in the complaint. The same form as the last is to be adopted for larcenies in the other buildings, ships, or vessels, mentioned in this section, the allegation in the complaint being made conformable to the fact.

*For breaking and entering a Meeting-House in the Night Time,
and committing a Larceny therein: On the Sixth Section of
the Statute.*

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the meeting-house of the first parish in said B., there situate, and erected for public uses, to wit, for the public worship of God, in the night time did break and enter, and two silver cups, of the value of fifty dollars, of the goods and chattels of the first Church of Christ in the said town of B., then and there, in the meeting-house aforesaid, being found, feloniously did steal, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

*For breaking and entering a Court-House in the Night Time,
and committing a Larceny therein: On the Sixth Section of
the Statute.*

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the court-house of the said county of S., there situate, and erected for public uses, to wit, for holding the judicial courts in the said county of S., in the night time did break and enter, and [here insert the articles stolen, and allege the value of each,] of the goods and chattels of the said county of S., then and there, in the court-house aforesaid, being found, feloniously did steal, take, and carry away; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.† Wherefore &c.

* If the property stolen belongs to the parish or to an individual, and not to the church, it must be so alleged in the complaint.

† If the larceny be committed in a "town-house," it must be alleged to be the property of the town in which it is situated, by its corporate name. If in a college or academy, the property must be alleged to be in the college or academy, by its corporate name, and they must be alleged to be buildings erected for public uses.

For breaking and entering a Stable in the Night Time, and committing a Larceny therein : On the Sixth Section of the Statute.

A. B. of B., in the county of S., innholder, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the stable of him the said C. D., there situate, in the night time did break and enter, and one gelding of the value of one hundred dollars, one saddle of the value of ten dollars, and one bridle of the value of five dollars, of the goods and chattels of the said A. B., then and there, in the stable aforesaid, being found, feloniously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

The same form is to be used, when the larceny is committed in any of the other private buildings, mentioned in this section of the statute, always describing the buildings in the very words of the statute.

For stealing from the Person, openly and violently : On the Eighth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver watch with a steal chain, of the value of twenty dollars, of the goods and chattels of him the said A. B., then and there, openly and violently, from the person of him the said A. B., feloniously did steal, take, and carry away ; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For stealing from the Person, privily and fraudulently : On the Eighth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, sundry bank bills, amounting together to the sum of thirty dollars, and of the value of thirty dollars, and sundry pieces of silver coin, current by law and usage within this Common-

wealth, amounting together to the sum of five dollars, and of the value of five dollars, of the goods, chattels, and moneys of him the said A. B., then and there, privily and fraudulently, from the person of him the said A. B., feloniously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a second Conviction of Larceny : On the Third Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one mare of the value of fifty dollars, one saddle of the value of five dollars, and one bridle of the value of two dollars, of the goods and chattels of the said A. B., then and there in the possession of the said A. B. being found, feloniously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. And the said A. B., upon his oath aforesaid, further complains, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at in and for the county of on the Tuesday of in the year of our Lord one thousand eight hundred and the said C. D. was duly and legally convicted, for that he the said C. D. on with force and arms, at B. aforesaid, seventeen yards of linen cloth, of the value of five dollars, of the goods and chattels of one E. F., in his possession then and there being found, feloniously did steal, take, and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary for receiving stolen Goods : On the Tenth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver spoon, of the value of five dollars, [enumerate the articles in the former conviction,] of the goods and chattels of one E. F., then and there in the possession of the said E. F. being found, feloniously did steal, take and carry away ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. And the

said A. B., upon his oath aforesaid, further complains, that G. H. of said B., laborer, afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in concealing the same, he the said G. H. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary, for harboring, concealing, and maintaining the principal Felon: On the Tenth Section of the Statute.

[State the offence against the principal felon, as in the next preceding precedent, and then proceed as follows.] And the said A. B., upon his oath aforesaid, further complains, that G. H. of said B., laborer, afterwards, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, the aforesaid C. D. did then and there knowingly harbor, conceal, and maintain, in the larceny and felony aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary for a Misdemeanor, in receiving stolen Goods, the principal Felon being unknown: On the Eleventh Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, being a person of evil name and fame, and a common buyer and receiver of stolen goods, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver tankard, of the value of fifty dollars, of the goods and chattels of him the said A. B., by a certain evil disposed person, to the said A. B. yet unknown, then lately before feloniously stolen of the said A. B., unlawfully, unjustly, and for the sake of wicked gain, did receive and have, he the said C. D. then and there well knowing the said goods and chattels to have been feloniously stolen; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary for a second Offence in receiving stolen Goods, the principal Felon being unknown: On the Twelfth Section of the Statute.

A. B. of B., in the county of S., upon his oath complains, that C. D. of said B., laborer, being a person of evil name and fame, and a common buyer and receiver of stolen goods, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, one silver tankard, of the value of fifty dollars, of the goods and chattels of him the said A. B., by a certain evil disposed person, to the said A. B. yet unknown, then lately before feloniously stolen of him the said A. B., unlawfully, unjustly, and for the sake of wicked gain, did receive and have, he the said C. D. then and there well knowing the said goods and chattels to have been feloniously stolen; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. And the said A. B., upon his oath aforesaid, further complains, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at within and for the county of on the Tuesday of in the year of our Lord one thousand eight hundred and the said C. D. was duly and legally convicted, for that he the said C. D. on with force and arms, at seventeen yards of linen cloth, of the value of five dollars, of the goods and chattels of one E. F., by a certain evil disposed person, to the said E. F. then unknown, then lately before feloniously stolen of him the said E. F., unlawfully, unjustly, and for the sake of wicked gain, did receive and have, he the said C. D. then and there well knowing the said seventeen yards of linen cloth to have been feloniously stolen as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

The foregoing precedents, drawn upon the different sections of the statute for the punishment of larceny, embrace all the cases which ordinarily occur, and (together with the notes,) will form a sufficient guide to the magistrate in most, if not all the prosecutions for which the statute makes provision. Several other sections of this statute, directing the proceedings of the prosecutor in obtaining a recompense for his expenses, those of the officer relative to the seizure and security of the property alleged to be stolen, and the taking of the recognisance of the party

charged in such a sum as shall be double the amount or value of the money or goods charged to be stolen, for the ultimate benefit of the owner, require the attention of the magistrate, that he may give the necessary directions and advice relative to these proceedings.

With respect to the first, viz. the proceedings of the prosecutor in obtaining a recompense for his expenses, the fourteenth section of the statute directs, "that in every case of a conviction of larceny, the justices of the court, before whom the conviction may be, shall have authority, at the prayer of the prosecutor therein, and at their discretion, to order for him a meet recompense, not exceeding his actual expenses, with a reasonable allowance for time and trouble in such prosecution, to be paid by the county treasurer."

This allowance cannot be granted in any case unless there is a conviction. The Supreme Court of this state have usually allowed to prosecutors all the sums which they have necessarily advanced in pursuing and apprehending the offender, either by the prosecutor himself or those whom he may have employed for that purpose. The sum usually allowed for these services is two dollars per day for time and trouble, and all expenses reasonably charged and necessarily expended. Sums offered or paid by the prosecutor as a reward for apprehending the criminal are never allowed. The mode of obtaining the allowance is, for the prosecutor to make out an account against the Commonwealth, in which he is to charge the expenses incurred and paid, including his charge for time and trouble, and make oath to it before a magistrate. It is then presented to the court, before which the conviction is had, for allowance, and if allowed, an order for the payment of it is transmitted to the county treasurer. All the preparatory steps for this purpose may, and with convenience can be taken before the magistrate who takes the examination, and commits or binds over the party for trial. As the assistance of the magistrate, in this service, is extra official, he is entitled to a reasonable compensation for it.

By the fifteenth section of the statute, it is made the duty of the sheriff, or other officer employed in apprehending and arrest-

ing the person accused, to seize and secure the money or goods alleged to be stolen, which shall be found in the possession of such accused person, or which shall be abandoned by him in flying from justice ; and to make an inventory or schedule of them, and to annex the same to the return of such officer, upon the warrant ; and the statute makes such sheriff, or other officer, accountable for the money or goods thereby seized and secured. This provision is very proper and salutary, when, as is often the case, large quantities of valuable goods are seized by the officer, and kept in his possession until the conviction is obtained, in order that the owner may have them returned to him by an order of restitution from the court. This part of the officer's duty must necessarily be performed before the proceedings are completed by the examining magistrate ; because the inventory to be made of the goods found upon the accused person, must form a part of the officer's return. This is very rarely done ; but the interest and security of the prosecutor requires that it should be attended to with particular care ; the waste, or possible loss of his property, ought not to be added to his other injuries. If the property stolen be of such a nature as it may be difficult to identify, such as bank notes, silver or gold coin, or other articles in which there is a perfect resemblance, such as a number of pairs of shoes, hats, and the like, special directions ought to be given to identify them by private marks, or by being kept in such a manner as that the officer, in whose custody they are retained, may be able to swear to their identity.

The seventeenth and last section of the statute requires, that when a person, charged with the crime of larceny, or as an accessory therein, or as a receiver of stolen goods, shall be bailed, the recognisance for the appearance of such person shall be taken, with sufficient surety or sureties, in such sum as may be reasonably required for that purpose ; *with a further additional sum*, which shall be double the amount or value of the money, goods, or articles, charged to have been stolen or obtained by such larceny ; in order that, if such recognisance be forfeited by default, the court, before whom judgment shall be rendered thereon, may order the amount or value of the money or other property, stolen

or obtained as aforesaid, to be paid to the prosecutor out of the sum which may be collected upon such recognisance. This provision was probably intended as one of the substitutes for the forfeiture of three-fold damages, as it was called, or treble the value of the property stolen, to the owner thereof, which made a part of the punishment of larceny by the former statute.

The duty of the magistrate, in carrying into execution this direction of the present statute, is very important. It must have been heretofore much, if not entirely neglected; for no proceedings in relation to it are recollected, during twenty years' official experience. Although the crime of larceny is usually committed by a class of low and profligate people, who are unable to procure sureties upon a recognisance to any considerable amount, yet cases have often happened, and are well recollected, in which the unfortunate owner of the stolen property might have been at least in part indemnified from his losses and injuries, by carrying into effect the provisions of this section of the statute. It seems, however, to be the duty of the justice *in all cases of larceny*, when the accused party is to be ordered to recognise for his appearance at court, to estimate the value of the property stolen, and to add double the amount or value thereof to the penalty of the recognisance for the appearance of the party, which penalty is to be in such a sum, *independent of the double amount or value of the property stolen*, as may be reasonably required for that purpose. It ought to appear in the record of the justice's process what is the sum, or double amount, or value of the property stolen, for which the party is ordered to recognise, for the benefit of the prosecutor. As no practice upon this subject is recollected, it may be a question in what manner this part of the order to recognise shall be made to appear upon the record of the process. The form of the recognisance will not admit of its being inserted in that document, the penalty of which must be in a precisely stipulated sum, and taken and entered into to the Commonwealth. It must therefore appear in the order or sentence of the justice, a transcript of which he is to certify, and send up with the other papers in the process. In this sentence and order, he will state, that he has ordered the party to recog-

nise, with sufficient surety or sureties, in such a sum, for his appearance at court, to answer to the crime, and abide the order of court &c., and also "in the further additional sum of [*stating the amount,*] it being double the amount of the money, goods, or articles, charged to have been stolen by the said A. B. [*the party accused,*] amounting together to the sum of \$, " which is to be the sum at which the penalty of the recognisance is to be fixed, and for which it is to be taken.

By this course of proceeding, it will appear upon the record what part of the penalty of the recognisance belongs to the prosecutor, in case it should be forfeited and the amount of it collected, which may preclude the necessity (though not the right) of further inquiry by the court. It certainly ought not to preclude the right; for it is possible the justice may err in his judgment as to the value of stolen property, to the prejudice either of the prosecutor or the government, in which case the court must retain the power "to rectify the procedure."

The following forms of complaints are drawn upon the statutes of this Commonwealth, of 1804, chap. 143, and of 1818, chap. 124.

For Robbery: On the Statute of 1804, Chapter 143.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon him the said A. B., in the peace of said Commonwealth then and there being, feloniously did make an assault, and him the said A. B. in bodily fear and danger of his life then and there feloniously did put, and one gold watch, of the value of one hundred dollars, of the goods and chattels of him the said A. B., from the person and against the will of him the said A. B., then and there feloniously, and by force and violence, did steal, rob, take, and carry away; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Accessary to a Robbery before the Fact.

[*Draw the complaint against the principal, according to the next preceding form, and then proceed.*] And the said A. B., upon his oath aforesaid, further complains, that E. F. of B., in the county aforesaid, laborer, before the committing of the felony and robbery aforesaid, in manner and form aforesaid, to wit, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did feloniously and maliciously counsel, hire, and procure the said C. D. to do and commit the felony and robbery aforesaid, in manner and form aforesaid ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For a capital Robbery, Prisoner being armed with a dangerous Weapon, with intent to kill or maim : On the First Section of the Statute of 1818, Chapter 124.

J. B. of B., in the county of S., gentleman, upon his oath complains, that M. M., lately resident in Medford, in the county of Middlesex, laborer, on the day of now last past, with force and arms, at Medford aforesaid, in the county aforesaid, in and upon him the said J. B., in the peace of said Commonwealth then and there being, feloniously did make an assault, and him the said J. B., in bodily fear and danger of his life, then and there feloniously did put, and one gold watch with a gold chain and seal, of the value of one hundred and fifty dollars, of the goods and chattels of him the said J. B., from the person, and against the will of him the said J. B., then and there feloniously, and by force and violence did steal, rob, take, and carry away, he the said M. M. being then and there, at the time of committing the assault and robbery aforesaid, armed with a dangerous weapon, to wit, with a pistol, with intent him the said J. B. to kill and maim ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

* This form is taken from the indictment, in the case of the Commonwealth v. Michael Martin, upon which the prisoner was convicted at the Supreme Judicial Court, in Middlesex, October term, A. D. 1821, and afterwards executed. There is a learned exposition of this statute, in that case, by Chief Justice Parker, upon the questions of law submitted by the prisoner's counsel.—17 M. R. 359. This was the first case that was tried after the statute was passed.

For a capital Robbery, Prisoner being armed with a dangerous Weapon, and actually striking and wounding the Person assaulted and robbed: On the latter Clause of the First Section of the Statute of 1818, Chapter 124.

A. B. of B., in the county of S., yeoman, upon his oath complains, that S. C. and G. C., both lately resident in B. aforesaid, laborers, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one Ezra Haynes, in the peace of the said Commonwealth then and there being, feloniously did make an assault, and sundry pieces of silver coin, current within this Commonwealth by the laws and usages thereof, amounting together to the sum of twelve dollars, and of the value of twelve dollars, of the moneys and property of him the said Ezra Haynes, from the person, and against the will of him the said Ezra Haynes, then and there feloniously, and by force and violence did rob, steal, take, and carry away; and that they the said S. C. and G. C. at the time of committing the assault and robbery aforesaid, were then and there armed with a certain dangerous weapon, made of iron, called a heading-tool, and being then and there so as aforesaid armed, they the said S. C. and G. C. with the dangerous weapon aforesaid, him the said Ezra Haynes, in and upon the face and head of him the said Ezra, then and there feloniously did actually strike and wound; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

LEWEDNESS AND LASCIVIOUS COHABITATION.

OPEN, gross, and notorious lewdness is an offence, at common law, against morality and religion, and punished as such.† This offence, together with that of lewd and lascivious cohabitation, is made punishable by a statute of this Commonwealth, passed soon after the establishment of its present government.

* This form is taken from the indictment in the case of the Commonwealth v. Clisby and Close, upon which they were convicted at the Supreme Judicial Court, November Term, A. D. 1821, in Suffolk, and afterwards executed.

† 4 Bla. Com. 64; Hawk, b. 1, c. 5, s. 4.

The last section of this statute* enacts, "that if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit together; or if any man or woman, married or unmarried, shall be guilty of open gross lewdness and lascivious behavior," they shall be punished &c.

Prosecutions upon this statute are of very frequent occurrence in this state. The question most generally arising, in those for open gross lewdness and lascivious behavior, is, whether the facts amount to proof of *open*, gross lewdness, or whether the transaction was secret or private, so as not to come within the meaning of the statute. In the case of the Commonwealth v. Catlin,† this was the only question, and by the unanimous opinion of the court, the evidence did not support the charge.

In the case of the Commonwealth v. Calef,‡ which was a prosecution for lascivious cohabitation, there is a short exposition of the statute relative to that offence. It was observed by the court, that "by cohabitation must be understood a dwelling and living together, not a transient and single unlawful interview. The design of the statute, in this provision, was to prevent evil and indecent examples, tending to corrupt the public morals." It was admitted by the defendant in that case, that *one* criminal act had taken place; but the court decided, that although that might be evidence to support a charge for adultery, it did not support the charge for lascivious cohabitation.

Form of a Complaint for lewd and lascivious Cohabitation.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of in the year of our Lord one thousand eight hundred and twenty, and from that day to the day of in the year of our Lord one thousand eight hundred and twenty-two, at B. aforesaid, in the county aforesaid, did lewdly and lasciviously associate and cohabit with one E. F. of said B., single woman, he the said C. D., during all the time aforesaid, being a married man, and having a lawful wife alive; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* Stat. 1784, chap. 40. \

† 1 Mass. Rep. 8.

‡ 10 Mass. Rep. 153.

For open gross Lewdness and lascivious Behavior.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, at B. aforesaid, in the county aforesaid, was guilty of open gross lewdness and lascivious behavior, by openly, grossly, lewdly, and lasciviously lying on a bed with one E. F. of said B., single woman, for the space of four hours; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

LIBEL.

THERE is no branch of the law which it is more difficult to reduce to exact principles, or to compress within a small compass, than that which relates to libels. In addition to what the ancient treatises contain, volumes have lately been written upon this subject,* in which the law of libels is clearly and amply stated. To these, and others which treat of this offence, the magistrate, who is desirous of obtaining a complete knowledge of it, must be referred. The following remarks comprehend a mere outline of the features of which it is composed; but will probably be a sufficient guide for all the purposes of originating and conducting a criminal prosecution by the magistrate, before whom and examination may be taken.

Libels, taken in their most extensive sense, signify any writings or pictures of an immoral tendency; but in the sense in which they are now to be considered, "are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, or ridicule." The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed.†

* Starkie on Slander, and Holt upon Libels.

† 4 Bla. Com. 150; Hawk. b. 1, c. 73, s. 1.

The most simple idea of a libel is, where the defamatory matter is reduced into *writing*. But the exhibition of a picture, intimating that, which in print would have been libellous, is equally criminal. So the fixing of a gallows at a man's door, the burning of him in effigy, or the exhibiting of him in any ignominious manner, is indictable as a libel.* But mere opprobrious words, unless they tend immediately to provoke a challenge, are not punishable by a public prosecution.†

What kind of defamation a libel must contain, is a subject of great difficulty and nicety; and must generally depend upon the nature of each particular case. But in general it is not to be doubted, that all publications, subversive of religion and morality, and tending to inflame the passions by indecent language, are indictable at common law. Publications, the natural tendency of which is to excite sedition, to bring the constitution and government into contempt, are highly criminal.

It is said that nothing can be clearer, than that *truth* is no justification of defamatory writings, as far as respects criminal prosecutions, for this reason, that the law subjects libellers to punishment, not as a mode of redress to the party libelled, but on account of the tendency which such libels have to occasion a breach of the peace.‡ And by the ancient common law, as officers of state have, at least, the same privileges with other persons, it follows, that to write truth, though ever so notorious, respecting them, which tends to "blacken their reputation, and expose them to public hatred, contempt, or ridicule," is in itself a libel.§ But this principle of the common law has, in one instance, been qualified, or rather a new principle introduced, as resulting from the nature of our government and constitution, by the Supreme Judicial Court of this state. In the case of the Commonwealth v. Clapp,|| it was decided, "that when any man shall consent to be a candidate for a public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it respects his fitness and qualifications for the office. And publications of the *truth* on this sub-

* Hawk. b. 1, c. 73, s. 2; 11 East, 227.

† Bull. N. P. 9.

‡ 2 Chit. C. L. 867.

§ 8 Salk. 140; 2 Campb. 142.

|| 4 M. R. 169.

ject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws."

"And every man, holding a public elective office, may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election, if he does not disclaim it. For the same reason, the publication of falsehood and calumny against public officers, or candidates for public officers, is an offence most dangerous to the people; because they may be deceived, and reject the best citizens, and it may be, to the loss of their liberties."

A greater latitude of observation is allowed on *books*, than on *characters*. When a work is sent into the world, the author subjects it to a fair and impartial criticism. For this purpose the critic may employ ridicule, however poignant; and is even allowed to attack the author himself, so far as he has mixed himself up with the composition he has thought fit to publish. But the moment the critic travels from the book, to follow the writer into his private life, and leaves his works to attack his character, the criticism becomes libellous.*

It is laid down generally by the older writers, that it is equally libellous to blacken the memory of the dead, as to detract from the reputation of the living.† This, however, can only be true when the writing has a tendency to create a breach of the peace, by inciting the friends and relatives of the deceased to revenge the insult offered to the family; and for this reason it must be alleged in the proceedings, and proved on the trial, that the publication was intended to create a breach of the peace, for the purpose of vindicating the deceased; and also intended to throw scandal and disgrace upon his family and descendants.‡

If the matter published be understood as scandalous, and calculated to excite ridicule or abhorrence against the party intended, it is libellous, however it may be expressed.§ Irony may

* 1 Campb. 355.

† Hawk. b. 1, c. 73, s. 1.

‡ 4 T. R. 126.

§ 5 East, 463.

convey imputations more effectually than direct assertion ; as by holding up the characters of public men to imitation, by praising them for qualities they are charged with wanting, and which from their situations they would not be expected to possess ; as if the libeller sets forth an illiterate general as a great scholar, he will be considered as imputing to him the want of the endowment as a disgrace.*

The initials being substituted for the name of the party libelled, will form no excuse to the writer, if his meaning be sufficiently obvious to the reader ; for it would be absurd, if that which is sufficiently plain to work all the mischief of a malignant slander, should be regarded as too obscure to be understood by jurors and judges.†

Immoral publications and obscene ribaldry are punishable ; because they tend to destroy the morality of public feeling, and to produce many of those crimes which require to be visited with severe penalties.‡

As to the *publication* of libels, as it regards both the composers and publishers of them, the following principles of law are taken from writers of approved authority. No allegation, however false, contained in articles of the peace, in answers to interrogatories, in affidavits duly made, or in any other proceeding in a regular course of justice, will render the party indictable as a libeller ;§ nor can any thing be charged as libellous which is contained in a petition to the legislature, however it may affect individuals.|| The reason is, that courts of justice are the constitutional tribunals to which complaints should be preferred ; and to bring alleged wrongs under their notice, is to support, and not to break the peace. So no presentment of a grand jury can be libellous. But where it appears, from the whole circumstances of the case, that the prosecution is commenced for the mere purpose of libelling, and without any intention to proceed in it, such an abuse and mockery of justice should not become a shelter for the guilt, which in reality they increase.¶

* Hawk. b. 1, c. 73, s. 4.

† 2 Chit. C. L. 863.

‡ 2 Stra. 788.

§ Hawk. b. 1, c. 73, s. 8.

|| Id.

¶ Id. ; 1 Saund. 181, n. 1.

Without a publication of some kind, the offence of libel is not complete, but the sending of a letter to the party himself, containing abusive language, is indictable, because it tends to provoke him to break the peace, in order to revenge the insult he has thus received.* The person who writes a libel, dictated by another, and who has discretion to understand its nature—he who originally procures it to be composed—he who actually composes it—he who prints, or procures it to be printed—he who publishes, or causes it to be published—and all who assist in framing or diffusing it—are implicated in the guilt of the offence.†

In the case of a libellous letter, the prosecution may be maintained, either in the county where it was written and put into the post office, or in that where it was delivered to the party to whom it was addressed.‡ It is proper to allege in the complaint, that the defendant composed, printed, and published the libel, because if it should appear that he did either, the charge will be supported.

The most important part of the complaint is the setting forth of the matter charged as libellous. The whole must be so explained by *inuendos* as to show its import to be scandalous and criminal. An *inuendo* is an averment to explain the defendant's meaning, by reference to matter previously introduced into the proceedings. It is necessary only where the intent may be mistaken, or where it cannot be collected from the libel itself.§ The practice of overloading the record with *inuendos*, to explain facts which need no explanation, has been recently censured by a learned English judge,|| who observed, that it seemed to proceed on the supposition that the court had no discernment, and the jury no understanding. The simple object of the *inuendo* is to reduce a *natural* to a *legal* certainty. It signifies no more than "*that is*," or "*to wit*," that such a person means a particular person, or such a thing means a particular thing.¶

* Hawk. b. 1, c. 73, s. 11; 6 East, 464.

† Hawk. b. 1, c. 73, s. 10; 1 Salk. 417—but see 3 Campb. 323.

‡ 2 Chit. C. L. 872, and the authorities there cited.

§ Cowp. 679, 683; 5 East, 463.

|| Lord Ellenborough; 2 Chit. C. L. 872, ¶ Id.

It is very material to state, that the libel was "*of and concerning*" the party intended. If the libel be in a foreign language, it is the practice to set it forth in the language in which it is written, and also to insert the translation.* It is not necessary to set forth the whole of the papers in which the libellous matter is contained; but those parts may be selected, which are most clearly libellous. The libel ought to be set forth with all possible correctness; for any variation in the sense, between the matter charged, and that proved, will be fatal.†

Publishing an obscene *book* is punishable as a libel;‡ and so is publishing, or exposing to view, an obscene *print*. The party may proceed in a criminal prosecution against the author; and he is not thereby precluded from obtaining redress by a civil action for the injury done to himself.§ For further information concerning the law of libels, see Hawk. b. 1, c. 73.—3 Bac. Abr. 491.—Com. Digest, title "Libel."—3 Bla. Com. 125.—4 Bla. Com. 150.—Holt on Libels.—Starkie on Slander, and the case of *The People v. Croswell*, Johns. Rep., where will be found one of the best arguments, by Kent, C. J. now extant, either in this country or in England.

Form of a Complaint for publishing a scandalous and libellous Letter, imputing the Crime of Theft to the Complainant.||

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, being a person of an envious, evil, and wicked mind and disposition, and wickedly and maliciously intending, as much as in him lay, to injure, valify, and ruin the good name, fame, and credit of the said A. B., and to bring him into contempt, hatred, disgrace, and infamy, on at in the county aforesaid, a certain false, scandalous, and libellous writing against the said A. B., of and concerning him the said A. B., falsely, maliciously, and scandalously did frame and make; and in the name of him the said C. D. did then and there write and publish, and cause to be written and published, in the form of a letter, directed to him the said A. B., the purport and effect of which said writing is as follows, to wit: "*To A. B., scoundrel,*" [meaning the said A. B.]

* 6 T. R. 162.

† 2 Chit. C. L. 875.

‡ 2 Stra. 788.

§ 4 Bac. Abr. 483.

|| Crown Cir. Comp. 421.

"it may not be amiss to acquaint you," [meaning him the said A. B.,] "as the time draws near, you" [meaning the said A. B.] "may be preparing yourself" [again meaning the said A. B.] "for a trial for stealing the turkeys out of my" [meaning his the said C. D.'s] "yard, when I" [meaning himself the said C. D.] "hope to see you" [meaning the said A. B.] "sing a neck psalm, and perish according to law. Subscribed C. D." [meaning himself the said C. D.] And that the said C. D., with intention to scandalize the said A. B., and to bring him into contempt, infamy, and disgrace, the said false, scandalous, malicious, and libellous writing, so as aforesaid framed, written, and made, afterwards, to wit, on the said day of in the year aforesaid, at aforesaid, in the county aforesaid, to divers good citizens of the said Commonwealth did openly deliver, and caused to be delivered and published; to the great scandal, infamy, and damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Libel on a private Individual.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of yeoman, being a person of an evil, wicked, and malicious disposition, and unlawfully and maliciously devising and intending, as much as in him lay, to scandalize, vilify, and defame the said A. B., and to bring him into public scandal, infamy, and disgrace, and to injure, prejudice, and aggrrieve him the said A. B., on the day of now last past, at B. aforesaid, in the county aforesaid, unlawfully and maliciously did compose and publish, and cause and procure to be composed and published, a certain false, scandalous, malicious, and defamatory libel, of and concerning him the said A. B., containing therein, among other things, the false, scandalous, malicious, defamatory, and libellous words and matter following, that is to say, [*here insert and state the libellous matter with proper inuendos, and then proceed as follows;*] which said false, malicious, and defamatory libel, he the said C. D. afterwards, to wit, on the day of in the year aforesaid, at B. in the county aforesaid, unlawfully, wickedly, and maliciously did send, and cause to be sent to one E. F. in the form of a letter, addressed to the said E. F., and did thereby, then and there, unlawfully, wickedly, and maliciously publish, and cause to be published, the aforesaid libel; to the great damage, scandal, infamy, and disgrace of him the said A. B., and against the

peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Libel on an Attorney, contained in a Letter.

A. B. of B., in the county of S., Esq., upon his oath complains, that on the day of &c. at B. in the county aforesaid, he being then one of the attornies of the Supreme Judicial Court of the said Commonwealth, had been and was, before the composing, writing, and publishing of the several false, scandalous, malicious, and defamatory libels hereinafter mentioned, retained and employed by one E. F., in the way of his the said A. B.'s profession and business of an attorney, to write a letter to one G. H., demanding payment of a certain sum of money, to wit, the sum of fifty dollars, then due and owing from the said G. H. to the said E. F.; and that the said G. H., late of in the county aforesaid, gentleman, being a person of an evil, wicked, and malicious mind and disposition, and unlawfully, wickedly, and maliciously devising and intending, as much as in him lay, to scandalize, vilify, and defame the said A. B., and to bring him into public scandal, infamy, and disgrace, and to injure, prejudice, and aggrieve him the said A. B., in his aforesaid business and profession of an attorney, on at aforesaid, of his great hatred, malice, and ill-will towards the said A. B., unlawfully and maliciously did compose and write a certain false, scandalous, malicious, and defamatory libel, of and concerning the said A. B., in his aforesaid profession and business, and of and concerning the said demand, so made by the said A. B. on the said G. H. as aforesaid, containing therein (amongst other things) the false, scandalous, malicious, defamatory, and libellous words and matter following, of and concerning the said A. B., that is to say, "*From our friendship*" [meaning the friendship between the said G. H. and E. F.] "*I*" [meaning the said G. H.] "*must own I*" [meaning again the said G. H.] "*did not expect a demand of fifty dollars from a pettyfogging rascal of an attorney, a Mr. A. B.,*" [meaning the said A. B., and that he was a pettyfogging rascal of an attorney,] "*who has been in and out of prison all his*" [meaning the said A. B.'s] "*life-time*;" which said false, scandalous, malicious, and defamatory libel, he the said G. H. afterwards, to wit, on the day of in the year aforesaid, at B. in the county aforesaid, unlawfully and maliciously did send, and cause to be sent to the said E. F., in the form of a letter, addressed to the said E. F., and thereby, then and there, unlawfully and maliciously did publish and cause to be published the aforesaid libel; to

the great damage, scandal, and disgrace of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Libel, by hanging the Complainant in Effigy.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county of yeoman, being a person of a wicked and malicious mind and disposition, and unlawfully and maliciously devising and intending, as much as in him lay, to injure and valify the good name, fame, and reputation of him the said A. B., and to bring him into great contempt, infamy, ridicule, and disgrace, on at did unlawfully and maliciously make, and cause to be made a certain gallows, and also a certain effigy and figure, intending to represent the said A. B., and afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully and maliciously erected and set up, and caused to be erected and set up the said gallows, in and upon a certain piece of ground near the public post-road and common highway there, and kept and continued, and caused and procured to be kept and continued the said gallows so there erected and set up as aforesaid, for the space of eight days then next following; and during all that time, at B. in the county aforesaid, the said C. D. unlawfully and maliciously hung up and suspended, and kept hung up and suspended, and caused and procured to be hung up and suspended, and to be kept hung up and suspended the said effigy and figure, so intended to represent the said A. B. to and upon the said gallows, and kept and continued, and caused and procured to be kept and continued the said effigy and figure, intending to represent the said A. B. as aforesaid, so hung up and suspended as aforesaid, for the said space of eight days, and during the said eight days respectively, then and there unlawfully and maliciously published and exposed the said gallows, with the said effigy and figure, so intended to represent the said A. B. as aforesaid, thereto suspended, to the sight and view of divers and all the citizens of said Commonwealth, passing and repassing in the public road and common highway aforesaid; to the great damage, infamy, and disgrace of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For a Libel on the Memory of a Person who was dead.**

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D. of B. in the county aforesaid, yeoman, being

* 4 T. R. 126; 2 Chit. C. L. 914—note k.

a person of a wicked, revengeful, and malicious disposition, and maliciously contriving and intending to injure, defame, vilify, and disgrace the memory, reputation, and character of one E. F. then deceased, and to bring the family, relations, and descendants of the said E. F. into great scandal, contempt, and infamy, and to cause it to be believed that the said E. F., in his life-time, was a person of a vicious and depraved mind and disposition, and destitute of filial duty and affection and of vicious sentiments and inclinations, and that the said E. F. led a wicked and profligate course of life, wickedly, unlawfully, and maliciously did print and publish, and cause and procure to be printed and published, in a certain newspaper, called "The World," a certain false, scandalous, and malicious libel of and concerning the said E. F. [*here set forth the libel, with proper inuendos* ;] to the great scandal and disgrace of the memory, reputation, and character of the said E. F., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

Form of a Complaint for publishing an obscene Print.

A. B. of &c., upon his oath complains, that C. D. of &c., being an evil disposed person, and devising, contriving, and intending the morals, as well of youth as of other good citizens of this Commonwealth, to debauch and corrupt, on the day of at in the county aforesaid, unlawfully, wickedly, maliciously, and scandalously did utter and publish to one E. F., a citizen of said Commonwealth, a certain lewd, wicked, scandalous, and obscene print on paper, representing a man in an indecent and obscene posture with a woman, to wit, in the act and posture of carnal copulation,* and which said lewd, wicked, scandalous, and obscene print, was contained in a certain printed book, entitled "Memoirs of a Woman of Pleasure;" to the manifest corruption and subversion of the morals and manners of youth, to the evil and pernicious example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

* The indictment from which this form is taken, and upon which judgment was rendered in the Supreme Court of Massachusetts, (17 Mass. Rep. 336, Commonwealth v. Holmes,) did not allege what the obscene posture was; and it was considered not to be necessary—perhaps, however, strict technical accuracy may require it.

MAINTENANCE.

MAINTENANCE is an offence that bears a near relation to common barratry ; and is an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.* It is an offence against public justice ; as it keeps alive strife and contention, and perverts the remedial process of the law to an engine of oppression. By the Roman law it was considered as an *infamous crime* to enter into any confederacy, or do any act to support another's lawsuit by money, witnesses, or patronage. A man may, however, maintain the suit of a near kinsman, servant, or poor neighbour, out of charity or compassion, with impunity.† Maintenance is an offence at common law, of which the statute of 32 Henry VIII. c. 9, is only in affirmance.‡

The buying up of disputed or pretended titles to real estate by a stranger, when the grantor is not seised, is an offence at law, and a species of maintenance.§ The following remarks of Ch. Just. Parker, in the case of *Swett & al. v. Poor & al.*,|| are highly important, and deserve a place in every description of this offence. Speaking of the history of the transaction, (which was a case of purchasing a disputed or dormant title,) he says, "it displays as gross an act of maintenance as was ever practised." And afterwards, "the bargain made by the plaintiffs undoubtedly constitutes the offence of maintenance, which is odious to the laws, and made punishable on indictment. It is an offence at common law ; and although instances of prosecution for it in this country may be rare, it is because the offence is rarely discovered, not because it is overlooked by our laws. The statute of 32 Henry VIII. c. 9, against buying and selling pretended titles, is only in affirmance of the common law ; and there is no offence more deserving of animadversion. For if successfully practised, its tendency is to disturb the quiet of neighbourhoods, and pro-

* 4 Bla. Com. 134, Chr. Ed. ; 1 Hawk. P. C. 240.

† Id.

‡ 11 M. R. 554, *Swett & al. v. Poor & al.*

§ 1 Hawk. P. C. c. 86 ; 7 M. R. 78 ; 6 M. R. 418.

|| 11 M. R. 553, 554.

duce distress to people, who, but for such intermeddlers, would be left in the quiet enjoyment of their possessions." For other descriptions of this offence, see Hawk. b. 2, c. 83.—Com. Dig. "Maintenance."—Burns J. "Maintenance."—Williams J. "Maintenance."—4 T. R. 340.—See also *Precedents*, 2 Stark. 678.—Trem. P. C. 178.—Winch. 504, 538.—4 Rast. Ent. 431.—Co. Ent. 364, 365.

Form of a Complaint for Maintenance of an Action of Debt.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of in the county aforesaid, yeoman, on the day of &c. at B. aforesaid, in the county aforesaid, did unjustly and unlawfully maintain and uphold a certain suit, which was then depending in the [*here state the court in which the suit was pending,*] between E. F., plaintiff, and G. H. defendant, in a plea of debt, on the behalf of the said E. F., against the said G. H., to the manifest hindrance and disturbance of justice; to the great damage of him the said G. H., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For the Maintenance of an Action of Ejectment.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., yeoman, on the day of and for the space of one year next following, at B. aforesaid, in the county aforesaid, unlawfully and unjustly maintained a certain action then pending in the Supreme Judicial Court of the said Commonwealth, between one E. F., plaintiff, and one G. H., defendant, of a plea of ejectment of a certain tract or parcel of land &c. [*here describe the premises demanded,*] on the behalf of the said E. F., and against the said G. H., to the manifest hindrance and disturbance of justice; to the great damage of him the said G. H., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

MALICIOUS AND FRAUDULENT MISCHIEF.

THE offences falling within the description of malicious mischief are particularly provided against in the statute of this Commonwealth, "providing for the punishment of incendiaries, and the perpetrators of other malicious mischief."* It is enacted by the fourth section of this statute, "that if any person shall wilfully and maliciously burn any stack of corn, hay, grain, straw, corn-stalks, flax, fences, piles of wood, boards or other lumber; or any soil, grass, trees, poles, or underwood of another; and if any person shall wilfully and maliciously kill, maim, or disfigure any one or more of the horses, sheep, or cattle of another," he shall be punished by solitary imprisonment and confinement to hard labor, or by fine and imprisonment, for the term, and to the amount, as specified in the statute.

It is presumed that this statute, as regards these offences, is merely in affirmance of the common law, and that each of the offences therein enumerated, when committed *wilfully and maliciously*, is punishable at common law. An offence of the same class and character has been punished in the Supreme Court of Massachusetts, in several instances, as a common law offence. In the case of the Commonwealth *v. Leach & al.*,† which was an indictment in the Court of Sessions against the defendants, for poisoning a cow, the indictment was at common law, and the prosecution sustained.

Several other cases of a similar description, tried at *nisi prius*, and not reported, have been prosecuted at common law, and sustained in the Supreme Judicial Court of this state. Very little is to be collected upon this subject from the English authorities, which has any application to the practice in this country; for although a great number of cases and offences are there to be found, they relate altogether to particular statutes which have no operation or authority with us.—See for these, 2 East, P. C. 1036, chap. 22.

* Stat. 1804, chap. 181.

† 1 M. R. 59.

Form of a Complaint for burning a Quantity of Boards: On the Fourth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, being an evil disposed person, on with force and arms, at a certain quantity or pile of boards, containing one thousand feet, of the value of ten dollars, of the property of him the said A. B., there lying and being, wilfully and maliciously did set fire to, burn, and consume; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For wilfully and maliciously maiming and disfiguring a Horse: On the Fourth Section of the Statute.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, being an evil disposed person, on with force and arms, at aforesaid, in the county aforesaid, a certain gelding of him the said A. B., of the value of one hundred dollars, did then and there wilfully and maliciously maim and disfigure, by wilfully and maliciously cutting off the ears of said gelding, and by wilfully and maliciously cutting and wounding one of the legs of the said gelding, whereby he was greatly injured and rendered useless and of no value; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.†

MANSLAUGHTER, See "Murder."

* The same form is applicable to all the other articles of property mentioned in the statute.

† If this form be substantially followed, it will answer for all the variety of cases which may arise under this branch of the statute; in all which cases the manner of inflicting the injury, and of committing the mischief, must be particularly set forth in the complaint.

There are other animals, for the wilful and malicious destruction of which, a criminal prosecution may be maintained at common law, which are not comprehended within the terms "horses, sheep, or cattle," as used in the statute; such as hogs, poultry, &c. Prosecutions for the wilful and malicious destruction of these have been maintained, at common law, in the Supreme Court of this state. In these cases the complaint may be drawn conformable to the foregoing precedents, and conclude at common law; that is, "against the peace and dignity of the commonwealth," instead of concluding "contrary to the form of the statute in such case made and provided." For an exposition of the English statute upon this subject, see 2 East, P. C. chap. 22, sec. 18, 19.

MARRIAGE—UNLAWFULLY SOLEMNIZED.

By a statute of this Commonwealth of 1786, chap. 3, it is enacted, "that if any justice or minister shall, otherwise than is expressly allowed and authorized by this act, join any persons in marriage, they shall severally forfeit and pay the sum of *fifty pounds* ; two thirds thereof to and for the use of the county wherein the offence may be committed, and the residue to the prosecutor ;" to be sued for and recovered by the county treasurer, or by the parent, guardian, or other person, under whose immediate care and government either of the parties was, at the time of such marriage, by a civil action in the Court of Common Pleas ; and by a subsequent clause in the same section of the statute, it is further enacted, "that if any person whatever, not authorized and empowered to solemnize marriages by this act, shall join any persons in marriage, and be thereof convicted in the Supreme Judicial Court, upon presentment or indictment," he shall suffer the punishment inflicted by the statute.*

Form of a Complaint for solemnizing a Marriage without any Authority therefor : On the last Clause of the Sixth Section of the Statute.

A. B. of B., in the county aforesaid, yeoman, upon his oath complains, that C. D. of said B., yeoman, on the day of now last past, at B. aforesaid, in the county aforesaid, did unlawfully, knowingly, and wilfully join in marriage and solemnize matrimony between E. F., late of &c., and one G. H., then a single woman, he the said C. D. not being authorized and

A few years ago, an elephant, which was exhibited in the county of York, was wilfully and maliciously shot and killed, by certain BARBARIANS of that county. An indictment for this offence was drawn, at common law, and presented to the grand jury. They did not find sufficient evidence to return it as a true bill ; but it was not doubted, that if the evidence had been sufficient, the indictment might have been maintained at common law.

* See an able and learned exposition of this statute, and of the nature and objects of the marriage-contract, by Ch. Just. Parsons, in the case of the Inhabitants of Milford v. the Inhabitants of Worcester, 7 M. R. 48.

empowered to solemnize marriages by virtue of the act of this Commonwealth, entitled "an act for the orderly solemnization of marriages;" nor being authorized thereto, in any other manner, or by any other legal power and authority whatever; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c

MAYHEM.

MAYHEM, at common law, is the violently depriving another of the use of such of his members as may render him less able in fighting, either to attack his adversary, or to defend himself. The mere disfiguring, therefore, of the party injured, in such a way as not to affect his strength or power of fighting, such as cutting off the ear, or slitting the nose, does not come within this definition.* But the cutting off of a limb, the disabling or weakening of a hand or finger, the striking out of an eye or fore tooth, or the depriving one of those parts, the loss of which, in all animals, abates their courage, is held to be mayhem.†

By the ancient common law, the punishment of this offence was member for member, on the principle of the law of Moses; this practice has been long since exploded, and the punishment has been fine and imprisonment, with the exception of one *particular* species of mayhem.‡ But several English statutes have more clearly defined and provided for the punishment.

The statute of this Commonwealth, now in force, for the punishment of felonious mayhem, was passed in the year eighteen hundred and five,§ and enacts, "that if any person, with set purpose and aforethought malice, or intention to mayhem or disfigure, shall unlawfully cut out or disable the tongue, put out an eye, cut off an ear, slit the nose, or cut off the nose or lip, or cut off or disable a limb or member of any person, every such offender, and every person privy to the intent aforesaid, who shall be

* Hawk. b. 1, c. 55, s. 1, 2.

† 4 Bla. Com. 205, 206.

‡ Id.

§ Stat. 1804, chap. 123, sec. 4.

present, aiding and abetting in the commission of such offence, or not being present, shall have counselled, hired, or procured the same to be done, shall be punished " by solitary imprisonment and confinement to hard labor, or by imprisonment in the common gaol, for such term as the statute provides.

Form of a Complaint for Mayhem, by slitting the Nose: On the Fourth Section of the Statute of 1804, Chap. 123, Sec. 4.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, contriving and intending the said A. B. to maim and disfigure, in and upon the said A. B., in the peace of said Commonwealth then and there being, with set purpose and aforethought malice, and with intention him the said A. B. to maim and disfigure, unlawfully and feloniously did make an assault; and that the said C. D. with a certain iron bill, of the value of two cents, which he the said C. D. in his right hand then and there had and held, the nose of him the said A. B., with set purpose and aforethought malice, then and there unlawfully and feloniously did slit, with intention the said A. B., in so doing, in manner aforesaid, to maim and disfigure; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

* If there are more persons than one, " present, aiding, and abetting, in the commission of the offence," the complaint may charge them all as principals. If they were not present, but accessaries before the fact, they may be charged as such by setting forth the charge, as above, against the principals and then charging the accessary as in the preceding precedents in larceny &c. This form is taken from Cr. Cir. Comp. 435, and made conformable to this statute.

MURDER AND MANSLAUGHTER.

HOMICIDE, which is the killing of any human creature, is of three kinds ; justifiable, excusable, and felonious. The first has no share of guilt at all ; the second so little, that it is not punishable ; but the third is the highest crime against the law of nature that man is capable of committing.*

Justifiable homicide is where the act is done from an unavoidable necessity, without any desire, inadvertence, or negligence in the party killing, and therefore without any shadow of blame. As for instance, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity and civil duty. In some cases, homicide is justifiable, either for the advancement of public justice, or for the prevention of some atrocious crime, which cannot otherwise be avoided. Where an officer, in the execution of his office, kills a person that assaults and resists him, this is justifiable homicide, for the advancement of justice. Homicide, committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature, and by the common law ;† as if a person attempts a robbery or murder of another, or to break open, or set fire to a house in the night time.

Excusable homicide is of two kinds, either by misadventure, or upon the principle of self-defence. By misadventure ; as where a person doing a lawful act, without any intention of injury, unfortunately kills another. In self-defence ; as in cases where a man may protect himself from an assault, in the course of a sudden quarrel, by killing him who assaults him. But to excuse homicide, upon the plea of self-defence, it must appear that the slayer had no other possible means of escaping his assailant.‡

Felonious homicide is the killing of a human creature of any age or sex, without justification or excuse, and is divided into murder and manslaughter.

Wilful and deliberate *murder* is thus defined : “ When a per-

* 4 Bla. Com. 177, 178.

† Id.; Puff. L. of N. l. 2, c. 5.

‡ 4 Bla. Com. 184.

son of sound memory and discretion unlawfully killeth any reasonable creature in being, under the peace of the Commonwealth, with malice aforethought, either express or implied."* The writers upon this crime have considered that the best way of examining its nature is by explaining the several branches of this definition.

First, it must be committed by a person of *sound memory and discretion*. A madman, lunatic, or infant, is incapable of committing this crime, unless in such cases where he shows a consciousness of doing wrong, and of course a discretion or discernment between good and evil.† When madness amounts to a total perversion or absence of the intellectual faculties, it is an excuse for an enormity which may be committed under its influence. But where there is only such a partial derangement as leaves the party free to act or forbear in the particular case in question; or in the case of a lunatic, when he is guilty of the crime during a lucid interval, he will be equally liable to punishment with those who are perfectly sane.‡ But where the mind labors under such a delusion, that, though it discerns some objects clearly, it is totally deranged as to the object of its attack, the party will be entitled to an acquittal. See the whole of this subject argued and explained in Hadley's case, 5th vol. Erskine's Speeches. The temporary absence of reason produced by drunkenness, is not, in any case, an excuse for the acts or crimes which it may occasion or excite, but is rather an aggravation of them.§

As to *infants*, it is not ascertained with any precision at what age they shall be rendered responsible to the law. During the interval between seven and fourteen years, the infant is, *prima facie*, supposed to be destitute of criminal design; but this presumption diminishes as the age increases, and may be repelled by competent evidence of a vicious intention.|| For tenderness in years will not excuse a maturity in crime; the power of con-

* 8 Inst. 47; 4 Bla. Com. 195.

† 4 Bla. Com. 1956.

‡ 8 Inst. 6; 4 Bla. Com. 23.

§ Co. Lit. 247.

|| 1 Hale, 27; 4 Bla. Com. 23.

tracting guilt is measured rather by the strength of the delinquent's understanding, than by days and years.* Thus children of thirteen, ten, and eight years of age have been executed for capital offences, because they severally manifested a consciousness of guilt, and a mischievous discretion.† In these cases, however, the evidence, that the offender was capable of committing the crime, must be strong and clear, beyond all doubt and contradiction.‡

Secondly. To constitute murder, there must be *an actual killing*. But it is not necessary that death should be caused by direct violence. The following cases are mentioned, and have been decided, as coming within the meaning of this rule. A son carried his sick father, against his will, in an inclement season, from one town to another, in consequence of which he died; a woman left a new born child in an orchard, covered only with leaves, in which situation it was killed by a kite; parish officers removed a child from parish to parish till it perished for want of sustenance; all these were adjudged guilty of murder.§ Other instances of cruel and brutal negligence are to be met with in all the writers upon the law of crimes, which are of the same nature, and have been adjudged to amount to murder. See 1 East, P. C.—2 Chit. C. L.—4 Bla. Com. &c., title "Murder." If a physician gives a medicine to a patient with intent to cure him, which kills him, he will not be guilty of any criminal homicide.|| A man cannot, in any case, be adjudged guilty of homicide, unless the death takes place within a year and a day after the injury is inflicted.¶ And where the wound was adequate to the death, it will be no excuse to show, that had proper care been taken a recovery might have been effected. **

Thirdly. *The party killed must be a reasonable being, alive, and in the peace of the Commonwealth.* And therefore to take or administer a potion with a design to produce an abortion, is not murder at common law. But if the child be born alive and

* 4 Bla. Com. 23. † 1 Hale, 23; Fost. 72. ‡ 4 Bla. Com. 24.

§ 1 Hale, 431; 2 Palm. 545.

|| 1 Hale, 429.—But see 6 M. R. p. 134, *Commonwealth v. Thompson*.

¶ 4 Bla. Com. 197. ** 1 Hale, 428.

die by reason of the potion or bruises it received in the womb, it is said to be murder in those who administered or gave them.*

Lastly. The killing must be committed *with malice aforethought*. This is the great criterion which distinguishes murder from other killing; and especially from manslaughter, which comes nearest to it in guilt. It is, therefore, of great importance to ascertain in what this malice consists. The legal import of this term is not confined to a particular animosity to the deceased, but extends to an evil design in general, a wicked and corrupt motive, an intention to do evil, the event of which is dangerous and fatal.† This malice is either *express* or *implied*. Express malice is when one with a deliberate mind and formed design kills another; which design is evidenced by lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.‡ This takes place in the case of deliberate duelling, where both parties meet avowedly with intent to murder.§ If even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, he is guilty of murder by express malice; as when a park-keeper tied a boy to a horse's tail, and dragged him through the park; when a master beat his servant with an iron bar; and a school-master stamped on the breast of his scholar; so that each of the sufferers died. Instances of homicide, from general malice, or depraved inclination to mischief, fall where it may, are within the guilt of murder. If a person breaking an unruly horse, wilfully ride him among a crowd of persons, and death ensue from the viciousness of the animal; if a man, knowing that people are passing along the street, throw a stone likely to do great bodily harm; or shoot over the house or wall, with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any individual. And if in the prose-

* 4 Bla. Com. 198; 1 Hawk. 80. † Fost. 256; 1 East, P. C. 215.

‡ 1 Hale, P. C. 451; 4 Bla. Com. 199.

§ In this country the practice of duelling will probably be exploded. For it is now principally confined to boys and coxcombs; and if those who have any rank or consideration in society, engage in it, no other feelings are excited towards them, than those of scorn and contempt.

cution of any unlawful act, the party come with a resolution to resist all opposers ; as to commit a riot &c., if death ensue upon such resistance, it will be murder.*

The following summary, as to the instances of murder by malice, is taken from 1 East, P. C. c. 5, s. 2. "The grosser instances of murder, where the depravity of the heart, or malice above mentioned, is apparent, form the *first* class under this head. 2. When an officer, or one who assists in the advancement of justice where he lawfully may, is killed in the regular discharge of his duty. 3. When a private man, lawfully interfering to prevent a breach of the peace, is opposed in such his endeavour, and is slain. 4. Where death happens incidentally in the prosecution of some other felony. 5. Where it happens from other unlawful acts, of which death was the probable consequence, done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, though the death ensue against, or beside the original intent of the party. 6. From deliberate duelling."

In many cases, where no malice is expressed, *the law will imply it* ; as where a man wilfully poisons another ; in such a deliberate act the law implies malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice ; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause.† No affront, by words or gestures only, is a sufficient provocation to extenuate such acts of violence as manifestly endanger another's life. If one shoots at A., and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other. And the same is the case, where one lays poison for one person, and another, against whom the prisoner had no malicious intent, takes it, and it kills him. It were endless to go through all the cases of homicide, which have been adjudged malicious, either by express or implied malice.‡ For these the reader is referred to 1 East, P. C. and to a

* 1 East, P. C. c. 5, s. 18.

† 4 Bla. Com. 200.

‡ 4 Bla. Com. 201.

late treatise by Russell upon the law of crimes, title "Homicide," "Murder," &c.

Manslaughter is distinguished from murder in this, that it arises from the sudden heat of the passions; murder from the wickedness of the heart. Manslaughter is therefore thus defined; "the unlawful killing of another without malice, either express or implied, which may be *voluntary* upon a sudden heat, or *involuntary*, but in the commission of some unlawful act;" and hence it follows, that in manslaughter there can be no accessories before the fact, because it must be done without premeditation.* As to the first, if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter. So also, if a man be greatly provoked, as by pulling his nose, or other great indignity, (not offered by mere words or gestures only,) and immediately kills the aggressor, though this is not excusable upon the ground of self-defence, neither is it murder, for there is no previous malice; but it is manslaughter.† But in this and every other case of homicide upon provocation, if there be sufficient time for passion to subside and reason to interpose, and the person provoked, afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.‡ If a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, he will be guilty of manslaughter only. But if, after time for reflection, he returns and takes his revenge, the law will regard it as murder. For no man, in a civilized state, has a right to visit personal injuries with vengeance; it is on this subjugation of the natural passions to the general good, that society itself depends.§

As to the other branch of this offence, *viz. involuntary* manslaughter, it differs from homicide by misadventure in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter, in consequence of an unlawful one; as if two persons play at an unlawful sport, and one kills the other, it is manslaughter, because the original act was unlawful; but

* 1 Hale, 466; 4 Bla. Com. 190, 191.

† Kelyne, 135; 4 Bla. Com. 191.

‡ Foster, 296.

§ Foster, 296.—See post 327, directions as to form of complaint for manslaughter.

not murder, because the parties had no intention of doing each other any personal mischief.* So where a person does a lawful act, in an unlawful manner, and without due caution and circumspection; as where a workman throws down a stone or piece of timber into the street and kills a man. If this be done where few passengers pass, and he gives notice to the people, it is misadventure only; if it were in a populous town, where people are constantly passing, it is manslaughter, though he gives loud notice; but if he knows of their passing, and gives no notice at all, it is murder; for then it is malice against all mankind.† For the different species of homicide, and full and ample treatises upon them, see 1 East, P. C. c. 5.—Russell's Law of Crimes, title "Murder."—Hawk. P. C.—Hale's do. &c.

The following precedents are selected principally from the English books, and are applicable to those cases of murder which have most frequently occurred in this section of the country.

Form of a Complaint for Murder, by shooting with a Pistol, by which the Party immediately died.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B. &c., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D. a certain pistol, of the value of two dollars, then and there charged with gunpowder and a leaden bullet, which said pistol he the said C. D. in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said E. F., and that the said C. D. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by the force of the gunpowder aforesaid, by the said C. D. discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said E. F. in and upon the right side of the belly of him the said E. F., near the right hip of him the said E. F., giving to him the said

* 3 Inst. 56; 4 Bla. Com. 192.

† Id.

E. F. then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said E. F. in and upon the right side of the belly of him the said E. F., near the said right hip of him the said E. F., one mortal wound, of the depth of four inches, and of the breadth of half an inch ; of which said mortal wound he the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

[If the party did not immediately die of the mortal wound, the complaint must conclude as follows. Set forth the charge precisely as in the next preceding precedent, until you come to the words " of which mortal wound," &c. and then conclude thus :]

Of which mortal wound the said E. F., on and from the said day of until the day of at B. aforesaid, in the county aforesaid, did languish, and languishing did live ; on which said day of at B. aforesaid, in the county aforesaid, he the said E. F., of the mortal wound aforesaid, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by stabbing with a Knife.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said C. D. with a certain knife, of the value of twenty cents, which he the said C. D. in his right hand then and there had and held, the said E. F., in and upon the left side of the body, and be-

* See 2 Chit. C. L. 750, 752, from which this precedent is taken.—See also, in the same place, remarks and quotations as to the different phraseology of this and of ancient precedents.

tween the ribs of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said E. F., then and there with the knife aforesaid, in and upon the aforesaid left side of the body between the ribs of him the said E. F., one mortal wound, of the breadth of three inches, and of the depth of six inches, of which said mortal wound, he the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For Murder, by cutting the Throat.

A. B. of B., in the county of Suffolk, yeoman, upon his oath complains, that C. D. of said B., spinster, on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that the said C. D., with a certain case-knife, made of steel and iron, of the value of ten cents, which she the said C. D. in her right hand then and there had and held, the throat of him the said E. F. feloniously, wilfully, and of her malice aforethought, did strike and cut; and that she the said C. D., with the case-knife aforesaid, by the striking and cutting aforesaid, did then and there give to him the said E. F., in and upon the said throat of him the said E. F., one mortal wound, of the length of three inches, and of the depth of two inches; of which said mortal wound, he the said E. F., from the said day of to the day of aforesaid, at B. aforesaid, did languish, and languishing did live; on which said day of aforesaid, in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the said mortal wound, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, then and there feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.† Wherefore &c.

* See Cr. Cir. Com. 440, 441; 2 Chit. C. L. 756.

† See 2 Chit. C. L. 757, from which this precedent is taken.

For Murder, by throwing a Knife.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., laborer, on the day of
 now last past, with force and arms, at B. aforesaid, in the
 county aforesaid, in and upon one E. F., in the peace of the said
 Commonwealth then and there being, feloniously, wilfully, and of
 his malice aforethought, did make an assault, and that he the said
 C. D., with a certain large knife, made of iron and steel, of the
 value of ten cents, which he the said C. D. in his right hand then
 and there had and held, at and against him the said E. F. then and
 there feloniously, wilfully, and of his malice aforethought, did cast
 and throw, and him the said E. F., with the knife aforesaid, so cast
 and thrown, as aforesaid, then and there feloniously, wilfully, and
 of his malice aforethought, did strike and stab, and that the said
 C. D., with the knife aforesaid, so cast and thrown as aforesaid,
 in and upon the left side of the body of him the said E. F. then
 and there feloniously, wilfully, and of his malice aforethought,
 did strike and stab, and that he the said C. D., with the knife
 aforesaid, so cast and thrown as aforesaid, did then and there fe-
 loniously, wilfully, and of his malice aforethought, give to the said
 E. F., in and upon the left side of the body of him the said E. F.,
 one mortal wound, of the breadth of one inch, and of the depth
 of three inches ; of which said mortal wound, he the said E. F.
 then and there instantly died. And so the said A. B., upon his
 oath aforesaid, complains and says, that he the said C. D. him the
 said E. F., in manner and form aforesaid, then and there feloni-
 ously, wilfully, and of his malice aforethought, did kill and mur-
 der ; against the peace of said Commonwealth, and contrary to
 the form of the statute in such case made and provided. Where-
 fore &c.

*For Murder, by casting a Stone.**

A. B. of B., in the county of S., gentleman, upon his oath
 complains, that C. D. of said B., laborer, on the day of
 now last past, with force and arms, at B. aforesaid, in the
 county aforesaid, in and upon one E. F., in the peace of the said
 Commonwealth then and there being, feloniously, wilfully, and of
 his malice aforethought, did make an assault, and that he the said
 C. D. a certain stone, of no value, which he the said C. D. in
 his right hand then and there had and held, in and upon the right
 side of the head, near the right temple of him the said E. F.,
 then and there feloniously, wilfully, and of his malice afore-

* Cr. Cir. Comp. 438, 439.

thought, did cast and throw, and that the said C. D., with the stone aforesaid, so as aforesaid cast and thrown, the aforesaid E. F., in and upon the right side of the head, near the right temple of him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said E. F., by the casting and throwing of the stone aforesaid, in and upon the right side of the head, near the right temple of him the said E. F., one mortal wound, of the length of one inch, and of the depth of one inch; of which said mortal wound, he the said E. F., from the said day of in the year aforesaid, to the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, the said E. F., of the mortal wound aforesaid, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by striking with a Poker.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that he the said C. D. then and there with a certain iron poker, of the value of ten cents, which he the said C. D. in both his hands then and there had and held, the said E. F., in and upon the back part of the head of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike, giving unto him the said E. F., then and there, with the said iron poker, by the stroke aforesaid, in manner aforesaid, in and upon the back part of the head of him the said E. F., one mortal wound of the length of three inches, and of the depth of one inch; of which said mortal wound, he the said E. F., on the said day of at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which same day of aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the said mortal wound, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him

the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For Murder, by beating with Fists, and kicking on the Ground.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B. in the county aforesaid, laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did strike, beat, and kick the said E. F., with his hands and feet, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., and did then and there feloniously, wilfully, and of his malice aforethought, cast and throw the said E. F. down, unto and upon the ground, with great force and violence there, giving to the said E. F. then and there, as well by the beating, striking, and kicking of him the said E. F., in manner and form aforesaid, as by the casting and throwing of him the said E. F. down as aforesaid, several mortal strokes, wounds, and bruises, in and upon the head, breast, back, belly, sides, and other parts of the body of him the said E. F., to wit, one mortal wound on the left side of the belly of him the said E. F., of the length of five inches, and of the depth of three inches, [*here state the other wounds in the same way,*†] of which said mortal strokes, wounds, and other bruises, he the said E. F., from the said day of aforesaid, to the day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did languish, and languishing did live; on which said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the mortal strokes, wounds, and bruises aforesaid, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form

* If there are divers mortal wounds given, and they are mentioned or stated in the complaint, they must all be specially described, and the dimensions of all of them specified, and then it must be alleged, that the deceased died of them all. For this, see 2 Chit. C. L. 761, note (d). But if one mortal wound is properly described, and it is alleged that the deceased died of it, it is presumed to be sufficient.

† 2 Chit. C. L. 762, note (g).

aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*For Murder, by choking and strangling.**

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said C. D., with both his hands about the neck and throat of her the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did fix and fasten ; and that he the said C. D., with both his hands so as aforesaid fixed and fastened about the neck and throat of her the said E. F., her the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle ; of which said choking and strangling, she the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. her the said E. F. then and there, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by riding over a Person with a Horse.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said C. D. then and there riding upon a horse, of the value of fifty dollars, the said horse in and upon the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did ride and force, and him the said E. F., with the horse aforesaid, then and there, by such riding and forcing as aforesaid, did throw to the ground ; by means whereof the said horse, with his hinder feet, him the said E. F., so thrown to and upon the ground as aforesaid, in and upon the back part of the head of him the said E. F., did then

* 2 Chit. C. L. 764 ; Stark. 373.

and there strike and kick, thereby then and there giving to him the said E. F. in and upon the back part of the head of him the said E. F., one mortal fracture and contusion, of the breadth of two inches, and of the depth of one inch; of which said mortal fracture and contusion, the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by strangling with a Handkerchief.

A. B. of B., in the said county of S., yeoman, upon his oath complains, that C. D. of said B., laborer on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., with a handkerchief, of the value of twenty cents, about the neck of him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did put, fasten, and bind; and that the said C. D., with the said handkerchief, about the neck of him the said E. F., then as aforesaid put, fastened, and bound, him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which choking and strangling, the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For the Murder of a Bastard Child, by folding it in a Cloth.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., single woman, on the day of now last past, at B. aforesaid, in the county aforesaid, being pregnant with a certain female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and secretly, from her body, by the providence of God, did bring forth alive, which said female child, so born alive, was, by the laws of this Commonwealth

a bastard ; and that the said C. D. afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault ; and that the said C. D., with both her hands, the said female bastard child, in a certain linen cloth, of the value of five cents, feloniously, wilfully, and of her malice aforethought, did put, place, fold, and wrap up ; by means of which said putting, placing, folding, and wrapping up of the said female bastard child, in the said linen cloth, by her the said C. D. as aforesaid, the said female bastard child was then and there choked, suffocated, and smothered ; of which said choking, suffocation, and smothering, the said female bastard child then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. the said female bastard child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by throwing a Child into a Privy.

A. B. of B., in the county of S. yeoman, upon his oath complains, that C. D., late of said B., single woman, on the day of now last past, being pregnant with a female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and in secret, from her body, by the providence of God, did bring forth alive, which said female child, so born alive, was, by the laws of this Commonwealth, a bastard ; and that the said C. D. afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the said female bastard child, feloniously, wilfully, and of her malice aforethought, did make an assault ; and that the said C. D., with both her hands, the said female bastard child into a certain privy there situate, wherein was a great quantity of human excrements and other filth, then and there feloniously, wilfully, and of her malice aforethought, did cast and throw ; by reason of which said casting and throwing of the said female bastard child into the said privy, by her the said C. D., in manner as aforesaid, the said female bastard child, in the said privy, with the excrements and filth aforesaid, was then and there choked and suffocated ; of which said choking and suffocation

and there strike and kick, thereby then and there giving to him the said E. F. in and upon the back part of the head of him the said E. F., one mortal fracture and contusion, of the breadth of two inches, and of the depth of one inch; of which said mortal fracture and contusion, the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by strangling with a Handkerchief.

A. B. of B., in the said county of S., yeoman, upon his oath complains, that C. D. of said B., laborer on the day of now last past, with force and arms, at B. aforesaid, in the county of S. aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said C. D., with a handkerchief, of the value of twenty cents, about the neck of him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did put, fasten, and bind; and that the said C. D., with the said handkerchief, about the neck of him the said E. F., then as aforesaid put, fastened, and bound, him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which choking and strangling, the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For the Murder of a Bastard Child, by folding it in a Cloth.

A. B. of B., in the county of S., gentleman, upon his oath complains, that C. D. of said B., single woman, on the day of now last past, at B. aforesaid, in the county aforesaid, being pregnant with a certain female child, afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said female child, alone and secretly, from her body, by the providence of God, did bring forth alive, which said female child, so born alive, was, by the laws of this Commonwealth

with force and arms, in and upon the said child, in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault ; and that the said C. D. the said male child, so being alive, did then and there take and carry to a certain shed there situate, and the same child, so being alive, did then and there, in the said shed, feloniously, wilfully, and of her malice aforethought, hide, secrete, and conceal ; and the same child, so being alive, and so being hidden, secreted, and concealed, she the said C. D. did then and there feloniously, wilfully, and of her malice aforethought, leave and desert, and to nourish, sustain, and provide for the said male child, so being alive, she the said C. D. feloniously, wilfully, and of her malice aforethought, did wholly neglect and refuse ; by reason of which said hiding, secreting, and concealing the same child, in manner and form aforesaid, by the said C. D., and of the said refusal and neglect of the said C. D. to nourish, sustain, and provide for the said male child, the said child then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. the said male child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by drowning.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F. in the peace of the said Commonwealth then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault ; and that the said C. D. then and there feloniously, wilfully, and of his malice aforethought, did take the said E. F. into both the hands of him the said C. D., and did then and there feloniously, wilfully, and of his malice aforethought, cast, throw, and push the said E. F. into a certain pond there situate, wherein there was a great quantity of water ; by means of which said casting, throwing, and pushing of the said E. F. into the pond aforesaid, by the said C. D., in form aforesaid, he the said E. F., in the pond aforesaid, with the water aforesaid, was then and there choked, suffocated, and drowned ; of which said choking, suffocation, and drowning, he the said E. F. then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D., in manner and form aforesaid, him the said E. F.

feloniously, wilfully, and of his malice aforethought, did kill and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder, by poisoning.

A. B. of B., in the county of S., Esq., upon his oath complains, that C. D. of said B., yeoman, feloniously, wilfully, and of his malice aforethought, contriving and intending one E. F. with poison, feloniously, wilfully, and of his malice aforethought, to kill and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, feloniously, wilfully, and of his malice aforethought, did privately and secretly convey into and leave a great quantity of white arsenic, being a deadly poison, in the dwelling-house of him the said E. F. there situate ; and that the said C. D., contriving and intending as aforesaid, afterwards, to wit, on the same day and year aforesaid, the same white arsenic, with a certain quantity of beer, in the same house then and there being, then and there feloniously, wilfully, and of his malice aforethought, did put, mix, and mingle, he the said C. D. then and there well knowing the said white arsenic to be a deadly poison ; and that the said E. F. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, did take, drink, and swallow down a great quantity of the said beer, with which the said white arsenic was mixed and mingled by the said C. D. as aforesaid, he the said E. F. not knowing that there was any white arsenic, or other poisonous ingredient, mixed or mingled with the said beer as aforesaid ; by means whereof he the said E. F. then and there became sick and distempered in his body, and the said E. F., of the poison aforesaid, so by him taken, drank, and swallowed down as aforesaid, and of the sickness occasioned thereby, from the said day of in the year aforesaid, until the twenty-eighth day of said month, in the same year, at B. aforesaid, in the county aforesaid, did languish, and languishing did live ; on which said twenty-eighth day of in the year aforesaid, at B. aforesaid, in the county aforesaid, he the said E. F., of the poison aforesaid, and of the sickness and distemper occasioned thereby, died. And so the said A. B., upon his oath aforesaid, complains and says, that he the said C. D., in manner and form aforesaid, him the said E. F. feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder ; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Murder by placing Poison, so as to be mistaken for Medicine.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., laborer, feloniously, wilfully, and of his malice aforethought, devising and intending one E. F. to poison, kill, and murder, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain quantity of arsenic, to wit, two drachms of arsenic, being a deadly poison, feloniously, wilfully, and of his malice aforethought, did put, infuse, mix, and mingle in and together with water, he the said C. D. then and there well knowing the said arsenic to be a deadly poison; and that the said C. D. the said arsenic, so as aforesaid put, infused in, and mixed and mingled in and together with the water, into a certain glass phial, of the value of six cents, did put and pour; and the said glass phial, with the said arsenic put, infused in, and mixed and mingled in and together with water as aforesaid contained therein, then and there, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, feloniously, wilfully, and of his malice aforethought, in the lodging room of the said E. F. did put and place, in the place and stead of a certain salutary medicine then lately before prescribed and made up for the said E. F., and to be taken by him the said E. F., he the said C. D. then and there feloniously, wilfully, and of his malice aforethought, intending that the said E. F. should drink and swallow down into his body the said arsenic, put, infused, mixed, and mingled in and together with water as aforesaid, contained in the said glass phial, by mistaking the same as and for the said salutary medicine, so prescribed and made up for the said E. F., and to be by him the said E. F. taken as aforesaid; and the said A. B., upon his oath aforesaid, further complains, that the said E. F., not knowing the said arsenic, put, infused in, and mixed together with water as aforesaid, contained in the glass phial, so put and placed by the said C. D., in the lodging room of the said E. F., in the place and stead of the said salutary medicine, then lately before prescribed and made up for the said E. F., to be taken by him the said E. F., in manner aforesaid, to be a deadly poison, but believing the same to be the true and real medicine, then lately before prescribed and made up for, and to be taken by him the said E. F., afterwards, to wit, on the same day of in the year aforesaid, at B. aforesaid, the said arsenic, so as aforesaid put, infused in, and mixed together with water, by the said C. D. as aforesaid, contained in the said glass phial, so put and placed by the said C. D., in the lodging room of

him the said E. F., in the place and stead of the said medicine, then lately before prescribed and made up for the said E. F., he the said E. F. did take, drink, and swallow down into his body ; by means of which said taking, drinking, and swallowing down into the body of him the said E. F. of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F. then and there became sick and distempered in his body ; of which sickness and distemper of body, occasioned by the said taking, drinking, and swallowing down into the body of him the said E. F., and of the said arsenic, so as aforesaid put, infused in, and mixed together with water by the said C. D. as aforesaid, he the said E. F. on the said day of in the year aforesaid, at B. aforesaid in the county aforesaid, died. And so the said A. B., upon his oath aforesaid, complains and says, that the said C. D. him the said E. F., in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did poison, kill, and murder ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

NUISANCE.

A COMMON nuisance is defined to be an offence against the public, either by doing a thing which tends to the annoyance of all the citizens of the state, or by neglecting to do a thing which the common good requires. But annoyances to the interest of particular persons are not punishable by a public prosecution as common nuisances, but are left to be redressed by the private actions of the parties aggrieved.†

Common nuisances are, 1. Annoyances in highways, bridges, and public rivers, by rendering them inconvenient or dangerous to pass, either by actual obstructions, or by want of reparations. For both of these, the person so obstructing, or such individuals or corporations as are bound by law to repair them, may be in-

* The form of a complaint for manslaughter, is the same as for murder, leaving out the words " and of his malice aforethought " in every part of the complaint.

† 1 Hawk. c. 75, s. 1, 2.

dicted and punished. 2. All those kinds of nuisances, (such as offensive trades and manufactures,) which, when injurious to a private man, are actionable, are, when detrimental to the public, punishable by a public prosecution.* 3. All disorderly inns, ale-houses, houses of ill fame, gaming houses, stage plays *when unlicensed*, booths and stages for rope dancers, mountebanks, and the like, are public nuisances, and may, upon indictment, be suppressed.† 4. A common scold is a public nuisance to her neighbourhood, for which offence she may be indicted and punished by being placed in a certain engine of correction, called a *cucking stool*, frequently corrupted into *ducking stool*; the cucking stool signifies, in the Saxon language, the scolding stool.‡ But by a late decision in the Supreme Judicial Court of Massachusetts, it is settled, that this singular or rather ludicrous species of punishment, cannot be inflicted; upon the ground that the common law is changed by that provision of our constitution which declares, “that no magistrate or court of law shall inflict cruel or *unusual* punishments.”§

There are also other offences of this description, punishable as common nuisances at common law, and by ancient English statutes; such as making and selling fire-works and squibs, or throwing them about in any street; evesdroppers, or such as listen under walls or windows, to hearken after discourse, and thereupon to frame slanderous and mischievous tales.|| Also to make great noises in the night with speaking trumpets or horns, to the disturbance of the neighbourhood,¶ or to manufacture acid spirit of sulphur, vitriol, or aquafortis, in the vicinity of dwelling-houses,** are punishable as nuisances. There is also another offence made punishable as a public nuisance, by a statute of 6 Geo. I. called *bubbling the public*, by undertakings, attempts, and projects, for adventuring in certain schemes of commerce tending to the common grievance &c. This statute is not in force here; but as

* 4 Bla. Com. 167, 168.

† 1 Hawk. b. 1, c. 75, s. 6, 7.

‡ 4 Bla. Com. 169.

§ Declaration of Rights, art. 26. The report of the case here alluded to has not been published.

|| 4 Bla. Com. 168, 169.

¶ Stra. 704.

** 1 Bur. 333.

there are in this country other methods of "bubbling the public," besides attempts and projects "in schemes of commerce," the time may arrive, when the propriety of a similar law to prohibit them, and the waste of money and property which they occasion, may be more generally perceived.

Most of the nuisances above enumerated are declared to be and made punishable as such by statutes of this Commonwealth. Annoyances in *highways*, common training-fields, burying-places, landing-places, or other pieces of land appropriated to the general use, ease, and convenience of the community at large, or for the inhabitants of any particular county, town, district, parish, or precinct, are declared nuisances, and the mode of abating them, provided for by the general statutes, directing the method of laying out highways, passed February 27th, 1787,* and the statute making provision for the repair and amendment of highways, passed March 5th, 1787.†

Nuisances created by *offensive trades and manufactures* are prevented by the statute of this Commonwealth "for preventing common nuisances," passed June 7th, 1785,‡ which makes it the duty of the selectmen of the several towns within the Commonwealth, together with any two justices of the peace in the same county, where they shall judge such regulation to be necessary, from time to time, as occasion shall be, to assign certain places for the exercising of any of the employments "of killing creatures for meat, distilling of spirits, trying of tallow or oil, currying of leather, and making earthen-ware; and to forbid and restrain the exercise of either of them in other places, not so approved and allowed;" and all assignments of such houses or places by the selectmen, with the assent of two or more justices, are to be entered in the town-book, where such selectmen respectively belong, and also made known by notifications thereof, posted up in some public places in the same town. By other enactments in this statute it is provided, that when houses, thus assigned for the exercise of either of the aforesaid trades or employments, become a nuisance, they may be suppressed, by or-

* Stat. 1786, chap. 67.

† Stat. 1786, chap. 81.

‡ Stat. 1785, chap. 1.

der of court, upon an inquiry made thereinto by a jury. And a penalty is also created for making use of any house or place other than such as are permitted and assigned, as provided in the act, "by any distiller, tallow-chandler, manufacturer of oil, currier, butcher, or potter." And if the offender is convicted, he is to be bound by recognisance not to improve such building for either of the said purposes, for the term of three years; and such building may be taken down by order of court, as being a common nuisance, and the materials thereof sold at public auction.

By an act in addition to the statute last mentioned, passed March 4th, 1800,* there is a further provision, that when any house, assigned for the exercise of either of the trades or employments mentioned in the original act, becomes a nuisance, in the way and by the causes therein stated, it shall be lawful for any person aggrieved thereby to give notice thereof to the proprietor or occupant of such house; and if the same, upon trial, as provided in the act, shall be deemed a nuisance, and the proprietor or occupant shall not forthwith remove the same, he shall forfeit the sum of *twenty dollars* for each month which the said nuisance shall continue, after such notice.

All disorderly inns or taverns are common nuisances. By a statute of this Commonwealth "for the due regulation of licensed houses," passed February 28th A. D. 1787,† it is enacted, that no taverner, innholder, or victualler, shall have or keep any implements used in gaming, in their houses, yards, gardens or dependencies; nor shall they suffer any dancing or revelling in their houses or dependencies; nor any person to dring to drunkenness or excess therein." The penalties provided in this act, for these and other offences therein created, when the amount of the penalty does not exceed the sum of thirteen dollars and thirty-three cents, (four pounds of the former currency,) may be recovered before any justice of the peace within the county where the offence is committed. And every justice of the peace, before whom the conviction may be had, (where the party convicted

* Stat. 1799, chap. 75.

† Stat. 1786, chap. 68.

does not appeal,) is required by the statute, to make a certificate of the same, fairly written, and to return such certificate to the then next Court of General Sessions of the Peace for the county where the offence was committed, there to be read over in open court, and to be filed among the records of the same court, "to the end, among other things, that the breakers of this law are duly prosecuted." There is also a statute of this Commonwealth to prevent damage from certain fireworks.* This is often a great nuisance, the pealty for which is made recoverable before a justice of the peace by this statute.

The statute "directing the proceedings for the speedy removal of nuisances," passed June 19th, 1801,† vests important powers in justices of the peace; and although its salutary and necessary provisions do not appear to have been much resorted to, it may very often happen that they can and ought to be carried into execution, "when the laws now in force are inadequate to so speedy a removal of nuisances, as the exigencies of the public may require." By this statute two justices of the peace, *quorum unus*, are authorized to inquire by a jury, as therein directed, *into all nuisances*, erected by any person or persons; and if it be found, upon such inquiry, that a nuisance shall have been erected, created, or continued, by any person or persons, then such justice shall cause the same to be abated or removed.

This statute further directs, that complaints of *any existing nuisance* shall be made out in writing, and directed to any two justices of the peace, *quorum unus*, who shall thereupon make out their warrant to the sheriff of the county, commanding him to cause to come before them a jury to be drawn in equal proportions out of the jury box of the Supreme Judicial Court, by the selectmen of the three towns next adjoining to the town in which such nuisance may be, at a meeting of such selectmen, to be holden forthwith for that purpose, upon the requisition of the sheriff; which jury are empowered by the statute to inquire into the nuisance complained of. The statute then prescribes and enacts the forms of all the proceedings, excepting the complaint,

* Stat. 1806, chap. 55.

† Stat. 1801, chap. 16.

viz ; the form of the warrant to the sheriff, commanding him to summon the jury ; the summons to the party complained against ; the oaths to be administered to the foreman, and other jurors ; the form of the verdict, and of the writ for the removal of the nuisance. The other provisions of the statute relate to the mode of conducting the trial before the justices, and to the proceedings to be had upon the appeal, when claimed by the party accused. There is no form for the original complaint to the justices, prescribed in the statute. It is only therein directed that it shall be in writing ; but as the complaint for the nuisance is the foundation of all the subsequent proceedings, and may be quashed, or judgment upon it arrested for its informality or insufficiency, (this being a prosecution for an offence made cognizable by statute, by the justices to whom the complaint may be exhibited,) it is essential that it should be correctly and technically drawn ; a form for which will be found among the following precedents of complaints for nuisances.

The provisions of the statute are general, extending to "all existing nuisances." It is probable, however, that the more immediate object of it was the speedy suppression or removal of such nuisances as endanger the public health, the removal of which, by the ordinary process of law, might not be effected, till the mischief was suffered, and its fatal consequences produced. An instance of this kind is recollected to have occurred in the county of Berkshire in this state. By the erection of a dam at the outlet of a small pond or body of water, the surrounding meadows and low lands became overflowed ; an epidemic fever was supposed to have been produced by the vegetable putrefactions which this overflowing occasioned. Indictments for this nuisance were prosecuted in the Supreme Judicial Court for the county ; but as this court was held semi-annually, it was impossible to suppress the cause of the mischief in the due course of a public prosecution, until its fatal effects had been produced. The consequence was, that a number of persons endured the sickness, and some actually died of the fever which the nuisance was believed to have occasioned, while the prosecution for its removal was pending in court.

As prosecutions for common nuisances are not generally originated before justices of the peace, but are, in the first instance, commonly laid before the grand jury by the public prosecutor, a small number of precedents only have been selected from the numerous collections contained in the English books. Such as are selected, and which here follow, are adapted to those cases which most frequently occur.

The following are forms of complaints for common nuisances.*

For erecting and continuing a Building on a Part of a common Highway.

A. B. of B. &c., upon his oath complains, that there now is, and at the time of the obstruction and nuisance hereinafter mentioned, there was a certain common and public highway in the town of B., in the county aforesaid, leading from unto &c. [*here describe the way,*] for all the citizens of the said Commonwealth to go, return, pass, and repass, in and along the same, at their will and pleasure; and that C. D. of said B., yeoman, on the day of in the year of our Lord one thousand eight hundred and with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully and injuriously erect and build, and cause and procure to be erected and built, a part of a certain edifice and building in and upon a part of the common and public highway aforesaid, to wit, on square feet of the same common and public highway; and the said part of said edifice and building, so as aforesaid erected and built in and upon the said part of the common and public highway aforesaid, he the said C. D. from the said day of until this day, unlawfully and injuriously did keep up, maintain, and continue, and still doth keep up, maintain, and continue, whereby the said common and public highway hath been for and during all the time aforesaid, and still is greatly narrowed, obstructed, and stopped up, so that the citizens of said Commonwealth could not, during the time aforesaid, nor can they now, go, return, pass, and repass in and along the said common and public highway, as they were

* The mode of prosecution for not repairing highways and bridges in this state, is by indictment or information against the inhabitants of those towns, in their corporate capacity, in which the way, or road complained of, is situated. No process, therefore, for this offence, can be originated before a justice of the peace.

before used and accustomed, and still of right ought to do ; to the great damage and common nuisance of all the citizens of said Commonwealth, in and along the common and public highway aforesaid, going, returning, passing, and repassing ; against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For laying Timber in the Highway.

A. B. of B. &c., upon his oath complains, that C. D. of &c. on the day of now last past, and on divers other days and times, as well before as afterwards, with force and arms, at B. aforesaid, in the county aforesaid, in and upon the common highway, there leading from &c. unto &c., divers large pieces of timber unlawfully and injuriously did put and place, and caused to be put and placed, and the same large pieces of timber, so as aforesaid put and placed in the highway aforesaid, from the said day of aforesaid, until the day of the exhibiting of this complaint, in and upon the highway aforesaid, to be, lie, and remain, unlawfully and injuriously did suffer and permit, and still doth suffer and permit ; to the great damage and common nuisance of all the citizens of said Commonwealth, having occasion to pass and repass, go and return in, upon, and along the highway aforesaid, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

*For setting Fire to and throwing Crackers, without License : On the Statute of March 4th, 1806.**

A. B. of B. &c., upon his oath complains, and gives the said justice to understand and be informed, that C. D. of &c., on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did set fire to, and throw divers lighted crackers, without the license of the selectmen of the said town of B., whereby divers citizens of the said Commonwealth, then and there standing and being, passing and repassing, were then and there greatly terrified, and put in great peril and danger of bodily harm ; to the great damage and common nuisance of all the citizens of said Commonwealth there inhabiting and residing, passing and repassing ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* Stat. 1805, chap. 55.

For killing Cattle, and leaving their Blood and Offal, &c., whereby the Air was corrupted, &c.

A. B. of B., in the county of S., yeoman, upon his oath complains, that C. D. of said B., yeoman, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, with force and arms, at B. aforesaid, in the county aforesaid, in a certain house of him the said C. D., situate and being near to a public street and common highway there, and near the dwelling-houses of divers citizens of the said Commonwealth, did unlawfully and injuriously kill and slay, and cause and procure to be killed and slain divers oxen and other cattle; and the blood, excrement, offal, and other filth, from the said animals respectively coming and issuing, did then and there, on the said several days and times respectively, cause and permit to be and remain in the said house, and near to the same, for the space of ten hours on each of those days respectively, whereby divers noisome and unwholesome smells and stenchs from the excrement, blood, offal, and filth, coming and issuing from the said animals, then, and on the said other days and times respectively, there did arise, and the air thereby was greatly corrupted and infected; to the great damage and common nuisance of all the citizens of said Commonwealth there inhabiting and dwelling, and also of all other citizens of said Commonwealth, in, by, and through the said public streets and common highway there, going, passing, returning, repassing, and laboring, and against the peace and dignity of said Commonwealth aforesaid. Wherefore &c.

*For keeping a disorderly House for Dancing and Music.**

A. B. of B. &c., upon his oath complains, that C. D. of said B., laborer, on the day of &c. and on divers other days and times, before and afterwards, with force and arms, at B. aforesaid, in the county aforesaid, unlawfully and injuriously did keep and maintain a certain common and disorderly room for public dancing and music, and in said room, for his own lucre and gain, did unlawfully and injuriously cause and procure divers persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together; to the great damage and common nuisance of all the citizens of said Commonwealth, and against the peace and dignity thereof. Wherefore &c.

* 2 Burr. 1233.

For keeping a common Gaming-House.

A. B. of B., &c. upon his oath complains, that C. D. of said B., laborer, being an evil disposed person, and not minding to get his living by honest labor, on the day of now last past, and on divers other days and times, as well before as afterwards, with force and arms, at B. aforesaid, in the county aforesaid, a certain common gaming-house there situate for his lucre and gain, unlawfully and injuriously did keep and maintain, and in the said common gaming-house, on the said day of and on the said other days and times, there unlawfully and injuriously did cause and procure divers idle and ill disposed persons to be and remain in the said common gaming-house ; and to game together on the said day of and on the said other days and times there, did unlawfully and injuriously procure, permit, and suffer ; and the said persons, in the said common gaming-house there, on the said day of and on the said other days and times, by such procurement, permission, and sufferance of the said C. D., did game together ; to the great encouragement of idleness and dissipation, to the great damage and common nuisance of all the citizens of said Commonwealth, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For keeping a House of ill Fame.

A. B. of B. &c., upon his oath complains, that C. D. of said B., laborer, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, with force and arms, at B. aforesaid, in the county aforesaid, a certain common bawdy-house unlawfully and wickedly did keep and maintain ; and in the said house, for filthy lucre and gain, divers evil disposed persons, as well men as women, and common prostitutes, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain ; and in which house the said evil disposed persons, and common prostitutes, by the consent and procurement of the said C. D., on the days and times aforesaid, there did commit fornication ; whereby divers unlawful assemblies, riots, affrays, disturbances, and violations of the peace of the said Commonwealth, and lewd offences, in the same house on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated ; to the great damage and common nuisance of all the citizens of said Common-

wealth, in manifest destruction and subversion of, and against good morals and good manners, and against the peace and dignity of the Commonwealth aforesaid.* Wherefore &c.

Form of a Complaint against a Taverner or Victualer for having Implements of gambling in his House : On the Fifth Section of the Statute of 1786, Ch. 68.

A. B. of B., upon his oath complains, that C. D. of &c. at said Boston, on the day of being then and there licensed as a taverner, (*innholder or victualler, as the case may be,*) at a certain house (*shop or cellar*) there situate, did have and keep, in or about his said house, (*yard, garden, or dependancy, as the case may be*) dice, (*cards, bowls, billiards, or other implements of gaming, as the case may be,*) against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Taverner, Innholder, or Victualler, for suffering Persons to play at Games, within their Houses, or Dependances : On the Fifth Section of the Statute.

A. B. of B., upon his oath complains, that C. D. of on the day of at B. aforesaid, being then and there duly licensed as a taverner, (*innholder or victualler, as the case may be,*) at a certain house (*shop or cellar, as the case may be,*) there situate, did suffer E. F. (*or certain other persons, whose names are unknown to your complainant, as the case may be,*) to use, exercise, and play at a certain game called dice (*or cards, billiards, or other unlawful games, stating them,*) within his said house and the appendages thereof, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* It is not necessary to state particulars, as the names of those who frequent the house. 2 Burr. 1232; 1 T. R. 752, 754. If any unknown persons are proved to be there, behaving disorderly, it is sufficient to support the charge. Id. If a person be only a lodger, and make use of her room for lewd and disorderly purposes, she is guilty of keeping a house of ill fame, as much as if she were the proprietor of the whole house. 2 Chit. C. L. 40, note; 2 Lord Raym. 1197; 1 Salk. 382. A wife, as well as a husband, may be indicted for keeping a bawdy house, or other disorderly house, because the charge does not respect the ownership, but the criminal management of the house. 1 Salk. 384.

*Against a Person for playing at unlawful Games, at a Tavern
&c: On the Fifth Section of the Statute.*

A. B. of &c., complains, that C. D. of on the day of at B. aforesaid, at a certain house there situate, and which said house one E. F. was then and there duly licensed to occupy and keep as a tavern, (*inn or victualling shop, as the case may be,*) and was then and there in the occupation of the same for that use and purpose, did play at cards (*bowls, billiards, or other instruments used in unlawful gaming*), against the peace of said Commonwealth, and contrary to the form of the statute on such case made and provided. Wherefore &c.

*Against a Taverner, Innholder, or Victualler for suffering
Dancing or Revelling in his House &c.: On the Sixth
Section of the Statute.*

A. B. of B., upon his oath complains, that C. D. of on the day of at said Boston, in a certain house, (*shop, or cellar,*) there situate, which said house, (*shop, or cellar,*) the said C. D. was then and there duly licensed to keep as a tavern, (*inn or victualling house,*) did suffer and permit certain persons, whose names are unknown to your complainant, to assemble in said house, (*shop, or cellar,*) and there to remain dancing and revelling, for the space of hours, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

*Against a Person for dancing or revelling in a Tavern (Inn &c:)
On the Sixth Section of the Statute.*

A. B. of B., on his oath complains, that C. D. of on the day of at said Boston at a certain tavern, (*inn or victualling shop or cellar,*) there situate, which said tavern (&c.) one E. F. was then and there duly licensed to keep and maintain as a tavern (&c.) did, together with divers other persons to your complainant unknown, assemble in said tavern (&c.) and there remain for the space of hours, dancing and revelling; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Taverner (&c.) for suffering a Person to drink to excess in his Tavern: On the Seventh Section of the Statute.

A. B. of B., on his oath complains, that C. D. of on the day of at at a certain tavern-house (&c.)

there situated, which said C. D. was then and there duly licensed to keep and maintain, did suffer one E. F. in his said house, to drink strong liquor to excess, and until he the said E. F. then and there was drunk ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Taverner (&c) for entertaining Persons posted : On the Sixteenth Section of the Statute.

A. B. of B. complains, that C. D. &c., on at at a certain tavern (*inn or victualling house*) there situate, which said C. D. was duly licensed to keep and maintain, and did then and there keep and maintain, did entertain and keep in his said house, one E. F., and did suffer him to drink strong liquor, (*tipple or game &c.*) to excess in his said house, and the dependancies thereof ; and that said E. F. had then and there been duly posted by the selectmen of said town, as a common drunkard, (*tippler or gamester*), and that said C. D. had then and there been duly notified of the same ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*Form of a Complaint to two Justices of the Peace, quorum unus, for the speedy Removal of a common Nuisance, drawn on the Statute of 19th of June, 1801.**

Commonwealth of Massachusetts,

Suffolk ss. To A. B. and C. D., Esquires, two of the justices of the peace within and for the said county of S., *quorum unus.*

A. B. of B., in the said county of S., upon his oath complains, that C. D. of said B., yeoman, on the day of now last past, and on divers other days and times, between that day and the day of exhibiting this complaint, with force and arms, at B. aforesaid, in the county aforesaid, near the dwelling-houses of divers citizens of the said Commonwealth, and also near to divers streets and common highways there, did unlawfully and injuriously erect and set up, and cause to be erected and set up, a certain furnace, with a boiler therein, to be used for the boiling of the entrails and offal of beasts ; and that the said C. D., on the said day of and on the said other days and times, then and there divers large quantities of the entrails and offal of beasts, in the said boiler, unlawfully and injuriously did

* Stat. 1801, chap. 16.

boil ; whereby divers fetid, noisome, obnoxious, and unwholesome smells, odors, and stenches, then, and on the said other days and times, did arise and ascend from the entrails and offal, so boiled as aforesaid ; and the air thereby and thereabouts was greatly corrupted, contaminated, and infected, and the dwelling-houses of the said citizens of the Commonwealth, situated near to the furnace and boiler aforesaid, then, and on the said other days and times, were rendered unwholesome, offensive, unfit, and improper for habitation ; to the great danger and hazard of breeding an infectious and pestilential disorder among the said citizens of the Commonwealth, to the great damage and common nuisance of all the citizens of said Commonwealth inhabiting and residing near to the furnace and boiler aforesaid, as well as of all the said citizens going, returning, passing and re-passing, and laboring in and through the streets and common highways aforesaid, and against the peace and dignity of the Commonwealth aforesaid. Wherefore the said A. B. prays your honors, that the nuisance aforesaid may be speedily removed, and that such proceedings may be forthwith had and pursued, as are directed and provided by the statute in such case made and provided.

PERJURY AND SUBORNATION OF PERJURY.

PROSECUTIONS for perjury are more frequently *attempted*, in the Supreme Court of this state, than for any other offence, those of larceny and forgery only excepted. When a party in a lawsuit has been unsuccessful, and the witnesses against him have testified in any manner which he deems incorrect, whether it arise from misconception, surprise, or mistake, in the witness, or whether the fact sworn to be material, or of little or no importance, application for a process, or an indictment for perjury is usually the consequence. Parties in this situation are too often improperly advised and encouraged. The nature of this offence, and the evidence necessary to support a prosecution for it, are either not generally understood or not duly considered. It is doubtless for these reasons, that many of the complaints for perjury, which have been brought before the grand jury in this state, have been dismissed as groundless, or not maintainable by the

evidence brought forward to support them. When these prosecutions are instituted without the knowledge or advice of the public prosecutor, they are attended with great inconvenience, both to the public and to individuals, in all cases where they turn out to be groundless ; to the public by the loss of time spent in their investigation ; to the individuals, who are induced by the prosecution to attend as witnesses, when not summoned by legal authority, by the loss of their time and expenses ; there being no authority for the allowance of the fees of any witness not duly summoned or recognised to testify on the part of the government, in a prosecution which proves to be groundless, and in which no bill of indictment is found by the grand jury. It is, therefore, an important branch of the duty of a justice, to acquaint himself with the rules and principles of law relative to the crime of perjury, in order that on the one hand groundless prosecutions should not, through their instrumentality, be sent up for examination ; and on the other, that when there is probable reason to believe that this heinous and pernicious crime has been actually committed, every preparatory step should be taken for the trial of the party accused.

There is no material variance in the definitions of perjury, by the writers upon the law of crimes. The definition by Hawkins is selected, with a slight alteration, as being not only conformable to the principles of the common law, but as containing the identical words of the statute of this Commonwealth against perjury,* from which definition it is probable this statute was in part framed. Perjury, by the common law, is a wilful false oath, by one who, being legally required to depose the truth in a proceeding in a course of justice, swears positively, in a matter material to the point in issue, whether he be believed or not.† In every complaint or indictment, founded on the statute abovementioned, the allegation, that the witness “ was lawfully required to depose the truth in a proceeding in a course of justice,” is indispensably necessary. In complaints for perjuries, or false oaths, committed or taken in some other cases, as those of poor debtors to be dis-

* Stat. 1812, chap. 144.

† Hawk. b. 1, c. 69, s. 1.

charged from their imprisonment for debt, under the act made for their relief; which oaths are not, strictly speaking, taken "in a proceeding in a course of justice," or (which is presumed to be the same thing,) in a judicial proceeding, perhaps the allegation abovementioned may not be required; but as it is a part of the definition of perjury at common law, as well as by the general statute, it will be safe and advisable to insert it in all cases.

From the above definition it appears, 1. *That the oath must be false.* By this it is intended that the party must believe that what he is swearing is fictitious and false; for if, intending to deceive, he asserts that which may happen to be true without any knowledge of the fact, he is equally criminal, and the accidental truth of his testimony will not excuse him, inasmuch as he wilfully swears that he knows a thing to be true, which, at the time, he knows nothing of, and wickedly endeavours to induce those, before whom he swears, to proceed upon the credit of a declaration which any stranger might make as well as he.*

2. *The intention must be wilful and corrupt.* The oath must be taken, and the falsehood asserted with deliberation, and a consciousness of the nature of the evidence given; for if it seems rather to have been occasioned by the weakness of the party, as by inadvertency, surprise, or mistake in the import of the question, he will not be subjected to the penalties which a corrupt motive alone can deserve, and which the law inflicts upon him who commits voluntary and corrupt perjury, "which is of all crimes whatsoever the most infamous and detestable."† It has been decided in Pennsylvania, that one who swears wilfully and deliberately to a matter he rashly believes, but which he has no probable cause for believing, and which is false, is guilty of perjury.‡

3. *The proceedings must be judicial.* But it is in general true, that all false oaths which are taken before those who are intrusted with the administration of justice, in respect of any mat-

* Hawk. b. 1, c. 69, s. 6; 3 Inst. 166.

† Hawk. b. 1, c. 69, s. 2.

‡ 2 Chit. C. L. 154, Riley's Ed. note (1); 6 Burn. Rep. 249.

ter regularly before them, are perjuries.* It is laid down by Mr. Justice Blackstone,† “that the law takes no notice of any perjury, but such as is committed in some court of justice, having power to administer an oath; or before some magistrate, or proper officer, invested with a similar authority;” and he very justly condemns the practice of those magistrates who permit the taking of voluntary affidavits before them, in matters wholly extra-judicial, and upon every petty occasion; since it is more than possible, that, by such idle oaths, a man may incur the moral guilt, and at the same time evade the temporal penalties of the offence. But where an oath is required by a statute in an extra-judicial proceeding, the breach of that obligation amounts to perjury, when the statute contains an express provision to that effect; as in the statute of Massachusetts of March 3d, 1790,‡ empowering commissioners appointed to receive and examine the claims of creditors to insolvent estates, to require and administer an oath, the better to discover the truth of their claims; also, the statute for the relief of poor prisoners confined in gaol for taxes;§ and another statute for the relief of poor prisoners committed by execution for debt.—Stat. 1787, chap. 29.

If an oath be administered out of the state, although by a judge of the state, no indictment for perjury will lie; so decided in New-York. 1 Johns. Rep. 498. And if the justice issue an attachment on the oath of the creditor, the proceeding is erroneous, but the party may be indicted for perjury. 10 Johns. Rep. 167.

4. *The party must be lawfully sworn.* The person, by whom the oath was administered, must have competent authority to receive it. No false swearing before individuals, acting merely in a private capacity, or before officers who have no legal jurisdiction to administer the oath in question, will amount to the offence of perjury.||

5. *The assertion must be absolute and positive.* It is said to be now settled, that if a man swears *he believes* that to be true which he knows to be false, he swears as positively, and is as

* Hawk. b. 1, c. 69, s. 3.

† 4 Bla. Com. 137.

‡ 1 Mass. Laws, 490.

§ Stat. 1790, chap. 42.

|| 3 Inst. 166; 2 Chit. C. L. 304.

criminal in point of law, as if he had made a positive assertion that the fact was, as he swore he believed it to be.*

6. *The falsehood must be material to the matter in question*; for if it be of no importance, though false, it will not be perjury, because, as it does not concern the issue, it is, in this respect, extra-judicial,† idle, and insignificant. As if, upon a trial, the witness being asked whether A. brought a certain number of sheep from one town to another all together, answered that he did so, when in truth A. did not bring them all together, but part at one time and part at another; such witness was not guilty of perjury, because the substance of the question was, whether A. did bring them at all or not, and the manner of bringing them was only a circumstance. In like manner, when a witness swore, that one drew his dagger, and beat and wounded a man, when in truth he beat him with a staff, he was not guilty of perjury, because the beating only was material.‡ These cases are put by Hawkins; but see his reasoning as to the qualifications and exceptions with which they are to be understood, in the same section; and also in 2 Chit. C. L. 305, 306, and 1 Hawk. b. 1, c. 69, s. 8, note 3.

In perjury, the accusation must be proved by two witnesses, because if a person could be found guilty on the testimony of a single witness, there would be one oath against another.§ But it is said to be more reasonable, in all cases, to leave the evidence which the prosecutor can bring forward to the jury, who, under the direction of the court, will always be competent to decide on the degree of credibility which it deserves.|| By the English authorities it appears, that the party prejudiced by the perjury cannot be admitted as a witness to prove it.¶ But in this state, such party is admitted as a witness.

Subornation of perjury, at common law, is the procuring another to commit *legal* perjury, who, in consequence of the persuasion, takes the oath to which he has been incited. By the

* 2 Chit. C. L. 305; 3 Wills. 427; 1 Leach, 242.

† 3 Inst. 167; Hawk. b. 1, c. 69, s. 8. ‡ Id.

§ 1 Chit. C. L. 563, and authorities there cited. || Id.

¶ L. Raymond, 396; also see Hawk. b. 1, c. 69, s. 9, note 4; Id. sec. 10.

statute of this state against perjury and subornation of perjury,* it is enacted, "that whoever shall commit subornation of perjury, by procuring another person to commit wilful and corrupt perjury," shall suffer the same punishment, and be liable to the same "disabilities, as those persons who commit the principal offence." And by the third section of this statute it is further provided, "that if any person shall wilfully and corruptly *endeavour* to incite or procure another person to commit wilful and corrupt perjury as aforesaid, and the person so incited *do not commit such perjury*, the person so corruptly endeavouring to incite and procure the committing of perjury shall be punished by fine and imprisonment."

The following are forms of complaints for the crimes of perjury and subornation of perjury.

For Perjury, by a Witness, on the Trial of an Issue in the Supreme Judicial Court.

A. B. of B. &c., upon his oath complains, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at B. within and for the county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and twenty-two, in the said court, amongst the pleas of the said term, a certain issue was duly joined in the said court, between C. D. the plaintiff, and E. F. the defendant, in a certain action of trespass for assault and battery and false imprisonment, which action before that time had been commenced between the parties in that behalf, and was then pending in the Supreme Judicial Court aforesaid; and that afterwards, to wit, at the sitting of said court, before the justices thereof, the same issue came on to be tried, and then and there was tried, in due form of law, by a jury of the said county of S., in that behalf duly empannelled and sworn between the said parties; and that, upon the trial of the said issue, one G. H., late of in the county of laborer, did then and there, to wit, on the day of in the year aforesaid, at B. aforesaid, in the county of S. aforesaid, appear, and was produced as a witness for and on behalf of said C. D. the plaintiff, and that the said G. H. did then and there, before the said court, take his corporal oath, and was then and there duly sworn by the said court, that the evidence which he should

* Stat. 1812, chap. 144.

give to the said court and jury, touching the matters in question on the said issue, should be the truth, the whole truth, and nothing but the truth; the justices of said court having then and there sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and then and there, upon the trial of said issue, it became a material question, whether the said E. F. had struck the said C. D., or had dragged him by the hair of his head; and that thereupon the said G. H., being so produced and sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, devising and wickedly intending to cause a verdict to pass against the said E. F. and for the said C. D., on the trial of said issue, did then and there, before the said Supreme Judicial Court, falsely, maliciously, wilfully, and corruptly, and by his own proper act and consent, depose, swear, and give evidence, amongst other things, to the jurors of the said jury, so sworn between the parties aforesaid, in substance as follows, that the said E. F. the said defendant, dragged the plaintiff, the said C. D., by the hair of his head, on the ground, from his own door as far as Wilkinson the butcher's; whereas in truth and in fact, the said E. F. did not drag the said C. D., by the hair of his head, from his own door as far as Wilkinson the butcher's; and whereas in truth and in fact, the said E. F. did not drag the said C. D. by the hair of his head at all. And so the said A. B., upon his oath aforesaid, doth say, that the said G. H., in manner and form aforesaid, and of his own most corrupt mind, did falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the manifest perversion of public justice; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, in an Answer sworn to before a Master in Chancery.

A. B. of B. &c., upon his oath complains, that C. D. of &c. heretofore, to wit, on &c. at &c., did exhibit his bill of complaint, in writing, against E. F., therein described, of said B., yeoman, in the Supreme Judicial Court of this Commonwealth, begun and held at W., within and for the county of W., on the Tuesday of in the year of &c.; and the said C. D., in and by his said bill of complaint, among other things, stated and alleged, in substance, and to the effect following, to wit, [*here insert that part of the bill, concerning which the perjury was committed,*] as in and by the said bill of complaint of the said C. D. remaining filed of record,

in the said Supreme Judicial Court, amongst other things, more fully appears. And the said A. B., upon his oath aforesaid, further complains, that the said E. F., the defendant, in the said bill of complaint, afterwards, that is to say, on the day of

&c., at said B., in the county of S., did come, in his own proper person, before G. H. Esq., then and there being one of the masters in chancery of the said Supreme Judicial Court, and then and there did exhibit and produce to the said G. H. Esq., the answer in writing of him the said E. F. to the said bill of complaint, of the said C. D., entitled, "The answer of E. F. the defendant, to the bill of complaint of C. D., complainant;" and the said E. F. was then and there sworn in due form of law, and took his corporal oath, touching and concerning the matters contained in his said answer by and before the said G. H. Esq., he the said G. H. so then being one of the masters in chancery in the said Supreme Judicial Court, and then and there having sufficient and competent power and authority to administer an oath to the said E. F. in that behalf; and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to declare and depose the truth in a proceeding in a course of justice, did, upon his oath aforesaid, concerning the matters contained in his said answer, before the said G. H. Esq., then as aforesaid being one of the masters in chancery of the said Supreme Judicial Court, then and there swear, that so much of the said answer of him the said E. F. as related to his own acts and deeds was true; and that the said E. F., being so sworn as aforesaid, intending unjustly to aggrieve the said C. D., the said complainant as aforesaid, in his answer aforesaid, before the said G. H. Esq., he being then as aforesaid one of the masters in chancery in the said Supreme Judicial Court, and having sufficient and competent authority as aforesaid, falsely, knowingly, wilfully, and corruptly, by his own act and consent, upon his oath aforesaid, did answer, swear, and affirm, amongst other things, in substance as follows, that is to say, "and this defendant" (meaning himself the said E. F.) "says," [*here insert verbatim that part of the answer, relative to and comprising the part in which the perjury is alleged to have been committed,*] as by the said answer of him the said E. F. still remaining in the Supreme Judicial Court aforesaid, at B. aforesaid, in the county of S. aforesaid, amongst other things will appear; whereas in truth and in fact, [*then go on to negative the answer in the words of it, and in every part of it which is alleged to be false.*] And so the said A. B., upon his oath aforesaid, says, that the said E. F. falsely and wickedly, wilfully and corruptly, in manner and form

by the president of the said United States in the said Pennsylvania District,) and the said C. D. was thereupon, in due form of law, found, declared, and adjudged to be a bankrupt; and that the said C. D., being so as aforesaid found, declared, and adjudged to be a bankrupt, was, in due form of law, summoned and required to surrender himself to the commissioners in the said commission named, or the major part of them, at the office of the commissioners in the county court-house, in the city of Philadelphia aforesaid, to be examined and make a full and true discovery and disclosure of the estate and effects, according to the directions of the act of congress aforesaid in such case made and provided; and that the said C. D. did duly surrender himself to the said commissioners in the said commission named, or the major part of them, and did sign and subscribe such surrender, and submit to be examined, from time to time, upon oath, by and before the said commissioners, or the major part of them, touching and concerning his estate and effects, according to the directions of the act of congress aforesaid, in such case made and provided; and that the said C. D., on the said day of in the year aforesaid, having come to the office aforesaid of the said commissioners, before the commissioners aforesaid, in the said commission named and authorized to take the examination of the said C. D., in order that he the said C. D. might and should make a full and true discovery and disclosure of his estate and effects, agreeably to the directions of the act of congress aforesaid, and then and there, by and before the said commissioners, in the said commission named as aforesaid, was duly sworn, and took his corporal oath upon the holy Gospel of Almighty God, to make a full and true discovery and disclosure of his estates and effects as aforesaid, (the said Mahlon Dickerson, Thomas Cumpston, and John Sargent, the commissioners aforesaid, then and there having competent authority to administer the said oath to the said C. D. in that behalf;) and that the said C. D., being so sworn as aforesaid, not regarding the act of congress aforesaid, nor the punishment therein provided for wilful and corrupt perjury, but fraudulently and wickedly devising and intending to avoid and suppress a full and true discovery and disclosure of his estate and effects, and to subvert truth itself, did then and there, to wit, on the said day of in the year aforesaid, at the office aforesaid of the commissioners aforesaid, in and upon his examination aforesaid, taken by and before the said commissioners, in answer to an interrogatory, then and there duly administered to him the said C. D. in substance and to the effect following, that is to say, [*here insert the interrogatory, with proper inuendos,*]

he the said C. D. being then and there lawfully required to depose the truth in a proceeding in a course of justice, did falsely, corruptly, knowingly, and wilfully depose, answer, and swear, in substance and to the effect following, that is to say, [*here insert the answer, with proper inuendos ;*] whereas, in truth and in fact, the said C. D. did not &c. [*here go on to negative the answer in the words in which it was given ;*] and so the said A. B., upon his oath aforesaid, doth say, that the said C. D., in manner and form aforesaid, by his own act and consent, and of his own most wicked mind and disposition, did falsely, wickedly, wilfully, and maliciously commit wilful and corrupt perjury ; to the great displeasure of Almighty God, against the form of the act of congress in such case made and provided, and against the peace and dignity of the United States of America. Wherefore &c.

For Perjury, in a Complaint before a Magistrate.

A. B. of B. &c., upon his oath complains, that heretofore, to wit, on the day of &c. at &c., one C. D. went before E. F. Esq., one of the justices of the peace in and for the said county of duly and legally authorized to perform and discharge the duties of the said office, and then and there complained to the said justice, in due form of law, that one G. H. [*here insert the complaint,*] which said complaint of the said C. D., on the said day of at said in the county aforesaid, came on to be heard, examined into, and tried, in due course of law, before the said E. F. Esq., justice of the peace as aforesaid ; and that thereupon, then and there, the said G. H. having personally appeared before the said E. F. Esq., such justice as aforesaid, to answer the matters and charges contained in said complaint, and being then and there personally present, and having heard the same complaint read to him by the said E. F., such justice as aforesaid, he the said G. H. did then and there plead and allege, that he was not guilty of the said offence charged upon him in the said complaint ; and thereupon the said E. F., as such justice as aforesaid, proceeded to hear and determine the matter of said complaint in the presence of the said G. H. ; and that at and upon the said hearing of the said matter of said complaint by the said E. F., as such justice as aforesaid, I. J. of in the county of laborer, appeared as a witness in support of said complaint to and before the said E. F. Esq., and then and there as such witness, by and before the said E. F. Esq., such justice as aforesaid, was, in due form of law, sworn by the said E. F. Esq., to testify the truth, the whole truth, and nothing but the truth, relative to the complaint afore-

said, then and there in hearing before the said justice ; (he the said F. F. Esq. then and there having sufficient and competent authority to administer an oath to the said I. J. in that behalf ;) and that the said I. J., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, wickedly devising and intending to subvert the truth, and maliciously and wrongfully intending and devising to cause the said G. H. to be convicted of the offence charged and alleged against him in said complaint, then and there, at and upon the hearing and trial of the said complaint, by and before the said E. F. Esq., as such justice as aforesaid, did, as such witness as aforesaid, on his oath as aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly say, depose, swear, and give evidence to and before the said E. F. Esq., so being such justice, and as such justice so hearing the matter upon the complaint aforesaid, amongst other things, in substance and to the effect following, that is to say, [*here insert the false testimony in the words in which it was given ;*] whereas, in truth and in fact, [*here go on to negative the testimony in the words in which it was given.*] And so the said A. B., upon his oath aforesaid, doth say, that the said I. J., then and there, by his own act and consent, and in manner and form aforesaid, did knowingly, falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury ; to the great displeasure of Almighty God, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, in filiating a Child, before a Justice of the Peace.

A. B. of B. &c., upon his oath complains, that C. D. of said B., single woman, on the day of at B. aforesaid, in the county aforesaid, was pregnant with child, and that the said child was likely to be born a bastard, and to be chargeable to the said town of B., in the county aforesaid ; and that the said C. D., so being pregnant with child as aforesaid, wickedly and maliciously intending and contriving, not only to deprive one E. F. of his good name, fame, and reputation, and to put the said E. F. to great trouble and expense, but also falsely to charge the said E. F. with begetting her with child, and being the father of said child, of which she was then pregnant, on the day of at aforesaid, in her own proper person, went before G. H. Esq., then being one of the justices of the peace in and for the county aforesaid, duly and legally authorized and empowered to discharge and perform the duties of said office, and having sufficient and competent power and authority to ad-

minister an oath, and take the examination of her the said C. D. hereinafter mentioned, then and there the said C. D. was duly sworn before the said G. H. Esq., being such justice as aforesaid, and the said C. D. being then and there lawfully required to depose the truth in a proceeding in a course of justice, did then and there, upon her oath aforesaid, before the said G. H. Esq. as aforesaid, wilfully, and of her own free will and accord, falsely, wickedly, and corruptly say, depose, swear, and give in her examination, in writing, and under oath, as follows, to wit ; “ the voluntary examination of C. D. of &c., who saith ” [here insert the examination verbatim ;] whereas, in truth and in fact, the said E. F. was not, nor is the father of said child, with which the said C. D. was then pregnant, nor of any other child of the body of the said C. D. And so the said A. B., upon his oath aforesaid, doth say, that the said C. D., in manner and form aforesaid, wickedly, wilfully, falsely, and corruptly did commit wilful and corrupt perjury ; to the great displeasure of Almighty God, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, in giving Evidence on the Trial of an Issue on an Indictment for Perjury.

- A. B. of B., in the county of S., yeoman, upon his oath complains, that at the Supreme Judicial Court of the said Commonwealth, begun and holden at B., within and for the county of S., on the first Tuesday of November, in the year of our Lord one thousand eight hundred and twenty, before the honorable Isaac Parker Esq., then and now chief justice of the said court, a certain issue, in due manner joined in the said court, between the Commonwealth aforesaid and one C. D., upon a certain indictment then depending against the said C. D. for wilful and corrupt perjury, came on to be tried, and was then and there, in due form of law, tried by a certain jury of the country, in due manner returned, impannelled, and sworn for that purpose ; and that at and upon the trial of said issue, one E. F., late of B., in the county aforesaid, laborer, did then and there appear, and was produced as a witness for and on behalf of the said Commonwealth, and against the said C. D. upon the trial of the said issue, and the said E. F. was then and there duly sworn, as such witness as aforesaid, before the said Isaac Parker Esq., chief justice as aforesaid, that the evidence which he should give to the court and jury, between the said Commonwealth and the said C. D.,

the defendant, on the issue then depending, should be the truth, the whole truth, and nothing but the truth, (the said Isaac Parker Esq., the said chief justice, then and there having sufficient and competent power and authority to administer the said oath to the said E. F. in that behalf;) and the said E. F., being so sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material inquiry, whether [*here state the several material questions.*] And the said A. B., upon his oath aforesaid, further complains, that the said E. F. maliciously and corruptly intending to injure and aggrieve the said C. D., and to cause and procure him to be convicted of the wilful and corrupt perjury, whereof he then stood indicted as aforesaid, and to subject him to the pains, penalties, and punishments of the laws of this Commonwealth inflicted on persons convicted of that crime, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, then and there, on the trial aforesaid of the said issue, upon his oath aforesaid, before the said Isaac Parker Esq., chief justice as aforesaid, falsely, wickedly, knowingly, wilfully, and corruptly did say, depose, swear, and give evidence, amongst other things, in substance, and to the effect following, that is to say, [*here set out the evidence;*] whereas, in truth and in fact, the said C. D. did not [*here assign the perjury, by negating the false evidence given by the witness.*] And so the said A. B., upon his oath aforesaid, doth say, that the said E. F. falsely, wickedly, wilfully, and corruptly, by his own voluntary act and consent, and of his own wicked mind and disposition, did then and there, in manner and form aforesaid, commit wilful and corrupt perjury; to the great displeasure of Almighty God, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, on a Trial in the Supreme Judicial Court in a civil Action.

A. B. of B., in the county of S., upon his oath complains, that heretofore, to wit, at the Supreme Judicial Court, begun and holden at B., within and for the said county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and twenty before the honorable I. P. Esq., then chief justice of the same court, a certain issue duly joined in the said court, between one C. D. and one E. F., in a certain plea of trespass, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned,

impanelled, and sworn between the parties aforesaid ; and that, upon the said trial, G. H. of said B., yeoman, appeared as a witness on the behalf of the said E. F., the defendant, and was duly sworn, and took his oath before the said I. P., chief justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial, he the said I. P. having sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf ; and that at and upon the said trial, certain questions became and were material, in substance as follows, that is to say, [*here state the material questions ;*] and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, at and upon the said trial at the court aforesaid, then and there falsely, wilfully, voluntarily, and corruptly did say, depose, and swear, among other things, in substance and to the effect following, that is to say, [*here state the evidence with proper inuendos ;*] whereas, in truth and in fact, [*here assign the perjury by negating the evidence.*] And so the said A. B., upon his oath aforesaid, doth say, that the said G. H., in manner and form aforesaid, did commit wilful and corrupt perjury ; to the great displeasure of Almighty God, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, on the Trial of an Issue in an Action of Assumpsit.

A. B. of &c., upon his oath complains, that at the Supreme Judicial Court of said Commonwealth, begun and holden at within and for the county of on the Tuesday of in the year of our Lord &c. before the honorable I. P. Esq., then being chief justice of the said court, a certain issue duly joined in the said court, between one C. D. and one E. F. in a certain plea of the case upon promises, alleged by the said C. D. to have been made by him the said E. F. and not performed, in which the said C. D. was plaintiff, and the said E. F. was defendant, came on to be tried in due form and course of law, and was then and there tried by a certain jury of the country in that behalf, duly summoned, impanelled, and sworn between the parties aforesaid ; and that upon the trial of the said issue so joined between the parties aforesaid, G. H., late of in the county of yeoman, appeared as a witness for and on behalf of the said C. D., the plaintiff, in the plea

abovementioned, and was duly sworn and took his oath before the said I. P., chief justice as aforesaid of the said Supreme Judicial Court, to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue, he the said I. P., chief justice as aforesaid, then and there having competent authority to administer the said oath to the said G. H. in that behalf; and that upon the trial of the said issue, so joined between the parties aforesaid, certain questions then and there became and were material, that is to say, [*here state the material questions*;] and the said G. H., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, falsely, wickedly, wilfully, corruptly, and maliciously contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and to cause a verdict to pass against the said E. F. on the trial of the said issue, and thereby to subject him to the payment of sundry heavy costs, charges, and expenses, then and there falsely, wickedly, wilfully, and corruptly, and by his own act and consent, did say, depose, swear, and give evidence, among other things, to and before the said jurors, so sworn to try the said issue as aforesaid, and to and before the chief justice aforesaid, in substance and to the effect following, that is to say, [*here set out the false testimony with proper innuendos*;] whereas, in truth and in fact, [*here assign the perjury by negating the false testimony*.] And so the said A. B., upon his oath aforesaid, doth say, that the said G. H. then and there falsely, wickedly, wilfully, and corruptly, and by his own voluntary act, and of his own wicked mind and disposition, in manner and form aforesaid, did commit wilful and corrupt perjury; to the great displeasure of Almighty God, in evil example to others to offend in like case, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For Perjury, in taking the Poor Debtors' Oath, &c.

S. C. A. of &c., upon his oath complains, that by the consideration of the justices of the Circuit Court of Common Pleas for the Middle Circuit, holden at Boston, within and for the county of Suffolk, on the last Tuesday of December, in the year of our Lord one thousand eight hundred and twelve, the said S. C. A. and one J. B. recovered judgment against J. T. of M. in the county of W. aforesaid, trader, for the sum of four hundred and fifty-seven dollars and seven cents, damage, and twenty-five dollars and fifteen cents, costs of suit; and that af-

terwards, to wit, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and thirteen, execution of said judgment then remaining to be done, they the said S. C. A. and J. B. purchased out their writ of execution from the clerk's office of the said Circuit Court of Common Pleas for the Middle Circuit, directed to the sheriff of the said county of W. or his deputy, and commanding them or either of them, that of the goods, chattels, or lands of the said J. T., within their precinct, they cause to be paid and satisfied unto the said S. C. A. and the said J. B., at the value thereof in money, the aforesaid sums being four hundred and eighty-two dollars and twenty-two cents, in the whole, with twenty-five cents more for that writ, and thereof also to satisfy himself for his own fees; and for want of goods, chattels, or lands, of the said J. T., to be by said J. T. shown unto him to the acceptance of the said S. C. A. and J. B., or found within his said precinct, to satisfy the sums aforesaid, the said sheriff or his deputy was therein commanded to take the body of the said J. T., and him commit to the gaol in W., in the said county of W., and detain in his custody within the said gaol, until he pay the full sums above mentioned, with his the said sheriff's or his deputy's fees, or that he be discharged by the said S. C. A. and J. B., the creditors, or otherwise by order of law; and the said sheriff or his deputy was therein commanded to make return of said writ, with his doings therein, into the said Circuit Court of Common Pleas, to be holden at B., within the county of S. aforesaid, on the fourth Tuesday of March then next; and the said S. C. A. and J. B. then and there delivered the same writ of execution to one A. B., then and ever since one of the deputy sheriffs for the said county of W., to be by him served in due course of law; and that the said A. B., deputy sheriff as aforesaid, afterwards, to wit, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and thirteen, and before the said writ of execution was returnable, for want of goods, chattels, or lands, of the said J. T., found within his precinct, or shown to him by said J. T., arrested the body of the said J. T., and him committed to the Commonwealth's gaol in W., in the county of W. aforesaid, as by the said writ of execution he was commanded. And the said S. C. A., upon his oath aforesaid, further complains, that afterwards, to wit, on the eighteenth day of March, in the year of our Lord one thousand eight hundred and eighteen, he the said J. T. then standing committed as aforesaid, by force of the writ of execution aforesaid, then and there did complain, by a writing under his hand, to N. H., under-keeper of the said gaol in W., in the county of W.

aforesaid, that he had not estate sufficient to support himself in prison, and requested the said N. H. to make application to some justice of the peace in said county of W. for a notification to his said creditors, at whose suit he was committed, signifying his desire to take the benefit of the law provided in behalf of poor prisoners; and thereupon the said N. H., the under-keeper of the gaol aforesaid, did then and there apply in writing to A. L. Esq., one of the justices of the peace within and for the said county of W., therein signifying the complaint aforesaid of the said J. T.; and thereupon, on the said eighteenth day of March, in the year last aforesaid, the said A. L. made out a notification in writing, under his hand and seal, directed to the said S. C. A. and J. B., in which he signified to them, the creditors aforesaid, the desire of the said J. T. to take the privilege and benefit allowed in and by "an act entitled an act for the relief of poor prisoners committed by execution for debt," and therein notified them of the time and place appointed for the intended caption of the oath prescribed by the statute in such case made and provided, which notification was then and there, on the day and year last aforesaid, duly served on the said S. C. A. and said J. B. thirty days before the time appointed for the caption of the oath aforesaid. And the said S. C. A., upon his oath aforesaid, further complains, that afterwards, on the twenty-second day of April, in the year last aforesaid, at the gaol aforesaid, in the county of W. aforesaid, (being the time and place appointed in said notification for the caption of the oath aforesaid,) A. L. and W. C. W. Esqrs., two of the justices of the peace within and for the said county of W., each of whom was then of the *quorum*, and disinterested and not related either to the said creditors or the debtor, did assemble and call before them the said J. T. for the purpose of hearing and examining the said J. T., and administering to him the oath aforesaid; and that he the said J. T. did then and there appear before the said two last mentioned justices, (they the same two justices of the *quorum* then and there having sufficient and competent power and authority to administer the said oath to the said J. T. in that behalf,) and that he the said J. T. wickedly intending by color and pretext of the acts and statutes of the said Commonwealth to deceive and defraud the said S. C. A. and J. B., his creditors aforesaid, of their just debt aforesaid, then and there, to wit, on the twenty-second day of April, in the year of our Lord one thousand eight hundred and eighteen, with force and arms, at W. aforesaid, in the county of W. aforesaid, at the gaol aforesaid, before the two justices of the *quorum* aforesaid, falsely, wilfully, maliciously, and

corruptly did swear, depose, and declare, on oath, in the words following, to wit, "I, J. T., do solemnly swear before Almighty God, that I have not any estate, real or personal, in possession, reversion, or remainder, sufficient to support myself in prison, or to pay prison charges, except the goods and chattels by law exempted from attachment and execution; and that I have not, since the commencement of this suit against me, or at any other time, directly or indirectly, sold, leased, or otherwise conveyed, or disposed of to, or intrusted any person or persons whomsoever, with all or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with any intent or design to secure the same, or to receive, or to expect any profit or advantage therefor, or have caused or have suffered to be done any thing else whatsoever, whereby any of my creditors may be defrauded; so help me God:" and that after the taking of the said oath, the two justices of the *quorum* aforesaid made their certificate thereof to the said under-keeper of the gaol aforesaid, who thereupon then and there discharged the said J. T. from the gaol aforesaid to go at large; whereas, in truth and in fact, after the commencement of the said suit against the said J. T. by the said S. C. A. and J. B., and before the taking of the said oath, and during the confinement of the said J. T. on the execution aforesaid, to wit, on the seventeenth day of April, in the year of our Lord one thousand eight hundred and thirteen, he the said J. T. conveyed away a large and valuable real estate, lying in M., in the county aforesaid, consisting of ten acres and one hundred and thirteen rods of land, to one A. T., his brother, with intent to secure the same to, and in trust for his own use, and defraud his just creditors thereof; and which said estate and the full value thereof, after his taking the oath aforesaid, he received to his own use, and that he the said J. T., at the time of his taking the oath aforesaid, had a number of outstanding good and *bonâ fide* debts due to him on notes and accounts, and other personal estate in his possession and control, and which, after his taking the oath aforesaid, he collected and recovered to his own use and benefit, to the amount of four hundred dollars. And so the said S. C. A., upon his oath aforesaid, doth say, that the said J. T., on the said twenty-second day of April, in the year of our Lord one thousand eight hundred and eighteen, at W. aforesaid, in the county aforesaid, on his oath aforesaid, before the two justices of the *quorum* aforesaid, by his own act and concert, and of his own wicked and corrupt mind and disposition, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury; to the great displeasure of Almighty

God, in evil and pernicious example in others in like case to offend, against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

The following are the forms of complaints for the crime of subornation of perjury.

For Subornation of Perjury, by procuring a Woman to swear a Bastard Child upon an innocent Man.†

A. B. of &c., upon his oath complains, that one C. D. of &c., single woman, on the day of now last past, at B. aforesaid, was pregnant with child, and that said child was likely to be born a bastard, and be chargeable to the said town of B. in the said county of S. ; and that on the said day of aforesaid, at B. aforesaid, E. F. of B., in the county of S., yeoman, being a person of an evil mind and disposition, and wickedly and maliciously contriving and intending to deprive one G. H., not only of his good name, fame, and reputation, and to put him to great trouble and expense, but also to cause the said G. H. to be falsely charged with begetting the said C. D. with child, and with being the father of said child with which the said C. D. was then and there pregnant as aforesaid, did falsely, wickedly, knowingly, wilfully, and corruptly solicit, suborn, and procure the said C. D. to go before I. J. Esq., then and still one of the justices of the peace in and for the said county of S., duly and legally empowered and qualified to discharge and perform the duties of said office, and make oath that the said G. H. was the father of the said child, with which she was then pregnant ; and that in consequence, and by the means, encouragement, and effects of the said wicked and corrupt subornation and procurement of the said E. F., she the said C. D. afterwards, to wit, on the same day of in the year aforesaid, at said B., in the county aforesaid, did go in her proper person before the said I. J. Esq., being such justice as aforesaid, and having then and there sufficient and competent power and authority to administer an oath and take the examination of the said C. D. hereinafter mentioned ; and the said C. D. was then and there sworn before the said I. J. Esq. ; and the said

* This precedent is taken from an indictment drawn by the present Attorney General of Massachusetts.

† This precedent is drawn upon the statute of Massachusetts. It is also good at common law.—2 Chit. C. L. 475, 476.

C. D. being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, by the means and in consequence of the said wicked solicitation, subornation, and procurement of the said E. F., did then and there, upon her oath aforesaid, before the said I. J., being such justice as aforesaid, falsely, wickedly, wilfully, and corruptly say, depose, and swear, and give in her examination, in writing, and under oath, as follows, [*here copy and insert the examination verbatim, with proper inuendos* ;] whereas, in truth and in fact, the said E. F., at the time of soliciting, suborning, and procuring the said C. D. corruptly and falsely to swear as aforesaid, well knew that the said G. H. was not the father of the said child, with which she was then pregnant as aforesaid. And so the said A. B., upon his oath aforesaid, doth complain and say, that the said E. F., then and there, in manner and form aforesaid, did falsely, knowingly, wilfully, and corruptly commit subornation of perjury, by wilfully, falsely, knowingly, and corruptly suborning and procuring the said C. D. to commit wilful and corrupt perjury, in and by her oath aforesaid, in manner and form aforesaid; to the great displeasure of Almighty God, against the peace and dignity of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*For endeavoring to suborn a Person to give Evidence on the Trial of an Issue in the Supreme Judicial Court.**

A. B. of &c., upon his oath complains, that at the Supreme Judicial Court, begun and holden at B., within and for the county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and two, before Isaac Parker Esq., the chief justice of the said court, a certain issue duly joined in the said court between one C. D. and one E. F. in a certain plea of trespass, wherein it was alleged, in substance, that the said E. F. had, with force and arms, assaulted, beat, bruised, wounded, and ill-treated the said C. D., in which the said C. D. was plaintiff and the said E. F. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly summoned, taken, impannelled, and sworn between the parties aforesaid; and that before the trial of the said issue, and during the time the same was pending, to wit, on the day of at B. aforesaid,

* Cr. Cir. Comp. 587. This precedent is drawn on the statute of Massachusetts before cited, but it concludes also at common law.

in the county aforesaid, G. H. of in the county aforesaid, grocer, wickedly contriving and intending, as much as in him lay, to prevent justice and pervert the due course of law, and intending unjustly to aggrieve the said E. F., the defendant above named, and wickedly to cause and procure the said E. F. to be found guilty of the premises alleged against him in the said issue, and thereby to subject him to the payment of large sums of money for the payment of damages and costs to be recovered against him in the suit aforesaid, then and there, on the same day and year last aforesaid, at B. aforesaid, in the said county of S., did unlawfully and wickedly solicit, instigate, and, as much as in him lay, wilfully and corruptly endeavour to persuade and procure one I. J. to be and appear as a witness on the part and behalf of the said C. D., the plaintiff aforesaid, at the trial of said issue, so as aforesaid joined, and, upon the same trial, to commit wilful and corrupt perjury, by falsely swearing and giving in evidence to and before the jurors of the jury aforesaid, so sworn between the parties aforesaid to try the said issue, in substance and to the effect following, that is to say, [*here insert the evidence which the party was instigated to give, with proper inuendos, if necessary ;*] whereas, in truth and in fact, [*here assign the perjury intended to be committed, by negating the false evidence intended to be given ;*] in manifest subversion of justice, against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided. Wherefore &c.

PIRACY.

PIRACY, or robbery upon the high seas, is an offence against the universal law of society. As the pirate has renounced all the benefits of society and government, and has reduced himself to the savage state of nature by declaring war against all mankind, all mankind must declare war against him.* Piracy, by common law, is the committing of those acts of robbery and depredation upon the high seas, which, if committed upon the land, would amount to felony there.†

* 4 Bla. Com. 71.

† 1 Hawk. P. C. 100.

By the 8th section of the act of the Congress of the United States, passed the 30th of April, 1790,* made "for the punishment of certain crimes against the United States," it is enacted, "that if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars; or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship," he shall suffer death. And it is provided in the same section of the act, that the trial of crimes, committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. By the 9th and 10th sections of the same act, persons committing piracy, under color of any commission from a foreign prince or state, or on pretence of authority from any person; and also accessaries to a piracy before the fact, are to be punished with death; and by the 11th section of the same act, accessaries to a piracy after the fact, are to be punished by fine and imprisonment.

By the 33d section of the act of the Congress of the United States "to establish the judicial courts of the United States,"† it is thus enacted: "that for any crime or offence against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the

* 1 United States Laws, 102.

† Id. 72.

United States, as by this act has cognizance of the offence, and copies of the process shall be returned as speedily as may be, into the clerk's office of such court, together with the recognisances of the witnesses for their appearance to testify in the case; which recognisances the magistrate, before whom the examination shall be, may require, on pain of imprisonment."

It appears by the act last above cited, that justices of the peace, in the several states, have the same powers as to examining, bailing, or committing offenders against the laws of the United States, that they have and may exercise in their own particular states. The examinations, and other proceedings against these offenders, are generally before the Circuit or District Judge of the United States, when they reside within a reasonable distance from the place where the offenders are arrested or first brought into the United States; but when that is not the case, justices of the peace are required to discharge these duties. It is to be observed, that when justices of the peace issue their processes upon this law, against offenders, for the breach of the laws of the United States, they must make out and issue their processes and precepts "in the name of the United States," and not in the name of the state within which they reside. It has been so decided in the Circuit Court of the United States in Massachusetts.

The following are forms of complaints for the crime of piracy.

Against several, for piratically attacking, taking, and carrying away a Ship, and certain Goods on board the same.

United States of America.

Massachusetts District. To one of the Justices of the Peace within and for the County of Suffolk, in the State of Massachusetts, and within the Massachusetts District.

A. B. of B., within the District aforesaid, mariner, upon his oath complains, that C. D., late of said B., mariner, [*and eight others, with the like additions,*] on with force and arms, upon the high sea, out of the jurisdiction of any particular state, did piratically and feloniously set upon, board, break, and enter a certain merchant ship, called the Governor Strong, then being a ship belonging exclusively to citizens of the United States, to the said A. B.,

the complainant, as yet unknown, and then and there piratically and feloniously did assault certain mariners, whose names to the said A. B. are also yet unknown, in the same ship, and in the peace of the said United States then and there being; and did then and there, upon the high sea aforesaid, out of the jurisdiction of any particular state, piratically and feloniously put the said mariners in great fear and bodily danger of their lives; and the said merchant ship, and the apparel and tackle of the same, of the value of three thousand dollars, together with seventy chests of opium, of the value of five thousand dollars, then being in and on board the same ship, of the goods and chattels of certain citizens of the United States, to the said A. B. yet unknown; and then and there upon the high sea aforesaid, out of the jurisdiction of any particular state, being under the care and custody, and in the possession of the mariners aforesaid, they the said C. D. [*and the others, naming them,*] from the care, custody, and possession of the mariners aforesaid, then and there, to wit, upon the high sea aforesaid, out of the jurisdiction of any particular state, piratically, feloniously, and by force and violence, and against the will of the mariners aforesaid, did steal, rob, take, and run away with; against the peace of said United States, and contrary to the form of the statute thereof, in such case made and provided. And the said A. B., upon his oath aforesaid, further complains, and gives the said justice to be informed, that the said C. D. [*and the others, naming them,*] the offenders aforesaid, were first brought into B. aforesaid, in the said district of Massachusetts, after the commission of said offence; and that the said district of Massachusetts is the district into which they were first brought. Wherefore &c.

For piratically running away with a Vessel, by the Mariners of the same Vessel.

A. B. of B., aforesaid &c., upon his oath complains, that C. D. and [*ten others, naming them, and giving to each his proper addition,*] on the day of &c., they the said C. D. [*and the others*] then being mariners of, in, and on board a certain vessel of the said United States, called the Plattsburg, belonging and appertaining exclusively to certain citizens of the said United States, (whose names to the said A. B. are as yet unknown,) with force and arms, at and upon the high sea, out of the jurisdiction of any particular state, in and on board of the said vessel, whereof one W. H. was then and there master and commander; the same vessel, and the tackle, apparel, and furniture thereof, of the value of ten thousand dollars, and certain

goods and merchandise, to wit, [*here state the articles, and allege the value of each,*] all being then and there the goods, and chattels, and property of certain citizens of the United States, to the said A. B. as yet unknown, then and there being laden on board said vessel, called the Plattsburg ; then and there upon the high sea aforesaid, out of the jurisdiction of any particular state, with force and arms as aforesaid, piratically and feloniously did steal, take, and run away with ; they the said C. D. [*and the others,*] being then and there mariners of the said vessel, and in and on board thereof, upon the high sea aforesaid, and out of the jurisdiction of any particular state ; against the peace of the said United States, and contrary to the form of the statute of the Congress of the said United States in such case made and provided. [*Then go on to allege that the offenders were first brought into, or first arrested in this district, as in the conclusion of the preceding precedent.*]* Wherefore &c.

POLYGAMY.

POLYGAMY, corruptly called *bigamy*, is the offence of having a plurality of wives at once.† By the statute of this Commonwealth of 17th of February, 1785,‡ it is enacted, “that if any person within this Commonwealth, being married, or who hereafter shall marry, shall marry any person, the former husband or wife being alive, or who shall continue to live so married,” such person shall suffer the infamous punishments mentioned in the statute. In this act there are three provisos, creating exceptions to its general provisions. 1. That it shall not extend to any person whose husband or wife shall be continually remaining beyond sea, by the space of seven years together ; or whose husband or wife shall absent him or herself the one from the other,

* The two foregoing precedents may be adapted to all the other cases which are contemplated, or which may occur under the act of congress for the punishment of piracy, using in the forms the precise words of the statute which are applicable to the case.

† 4 Bla. Com. 163. See also 1 Hale, 692, 693, 694 ; Hawk. b. 2, c. 24 ; 1 East, P. C. 464.

‡ Stat. 1784, chap. 40.

by the space of seven years together ; the one of them, in either case, not knowing the other to be alive within that time. 2. That the act, or any thing therein contained, shall not extend to the wife of any married man, who shall willingly absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the mean time, if it shall be in his power so to do. 3. That the act, or any thing therein contained, shall not extend to any person that is or shall be, at the time of such marriage, divorced, by sentence of any court whatsoever, which has or may have legal jurisdiction for that purpose, unless such person is the guilty cause of such divorce ; nor to any person for or by reason of any former marriage had or made, or hereafter to be had or made, within the age of consent. And the statute further enacts, that the offenders may be tried and punished in the county where they may be apprehended, in the same manner as if the offence had been committed in such county. The provisions of this statute appear to be similar, as to the offence and the exceptions to it, as those of the ancient English statutes relative to the same offence, but not as to the punishment. By the statute of 1 James I. polygamy was made a capital offence ; but by a recent statute of 35 Geo. III. the same penalties are to be inflicted for polygamy as in cases of *petit larceny* !!!

Form of a Complaint for Polygamy.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of at B. in the county aforesaid, did marry one E. F., spinster, and the said E. F. then and there had for his wife ; and that the said C. D. afterwards, to wit, on the day of &c. at B. aforesaid, in the county aforesaid, did marry and take to wife one I. J., widow, and to the said I. J. was then and there married ; the said E. F., his former wife, being then and there living and in full life ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

SELLING UNWHOLESOME PROVISIONS.

THE sale of "diseased, corrupted, contagious, or unwholesome provisions, whether for meat or drink, knowing the same, without making it known to the buyer," is severely punished by a statute of this Commonwealth, passed the 8th of March, 1785.*

The giving of any person unwholesome victuals, not fit for man to eat, for the sake of gain, or from malice or deceit, is undoubtedly a misdemeanor at common law, and an indictable offence.† It is not necessary to set forth in the complaint what the materials were, which rendered the provisions noxious or unwholesome; nor is it necessary to allege, that the defendant intended to injure the health of the party to whom the unwholesome provisions were sold.‡

Form of a Complaint for selling unwholesome Provisions: On the Statute of Massachusetts above quoted.

A. B. of &c., upon his oath complains, that C. D. of &c., on the day of &c., at B. aforesaid, in the county aforesaid, being an evilly disposed person, from motives of avarice and filthy lucre, was induced to sell, and did sell to one E. F. a certain quantity of diseased, corrupted, contagious, and unwholesome provisions for meat; that is to say, one hundred pounds weight of diseased, corrupted, contagious, and unwholesome beef, knowing the same to be diseased, corrupted, contagious, and unwholesome, without making it known to him the said E. F., the buyer thereof; to the great damage of him the said E. F., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* Stat. 1784, chap. 50.

† 2 East, P. C. 822.

‡ 3 M. & S. 16.

RAPE,

AND

THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

THESE two offences are blended together in their nature, and are placed upon the same ground by the English statutes,* and by the statute of this Commonwealth of 1805, chap. 97.

Rape is the unlawful carnal knowledge of a woman, by force and against her will. For the evidence necessary to prove what the law terms *carnal knowledge*, the reader is referred to 12 Coke's Rep. 37.—Hawk. b. 1, c. 41, s. 3.—1 Hale, 628.—1 East, P. C. 439.—2 Leach, 854.

It is the essential feature of this crime, that it must be against the will of the female on whom it is committed; and its atrocity is not mitigated by showing that she yielded to violence, if her consent was obtained by duress or threats of murder. Nor will any subsequent acquiescence on her part excuse the guilt of the ravisher. The fact, that the person ravished is a common prostitute, does not diminish the guilt of the ravisher, because she is still under the protection of the law, and must not be deprived of the opportunity of repentance. Formerly it was held to be no rape for a man to have forcible knowledge of his own concubine, but the law now presumes the possibility of her return to virtue.† A man cannot be guilty of rape on his own wife, for the matrimonial consent cannot be retracted,‡ but he may be criminal in aiding and abetting others in such a design.§

All who are present, of either sex, aiding in the perpetration of rape, are principals, and liable to the same punishment.|| And though a male infant, under the age of fourteen years, is presumed to be incapable of committing a rape, yet he may be guilty as an abettor, if shown to possess a mischievous discretion.¶

* 1 East, P. C. 434.

† Hawk. b. 1, c. 41, s. 6 & 7.

‡ 1 Hale, 629.

§ 1 Harg. St. Tr. 888.

|| Hawk. b. 1, c. 41, s. 10.

¶ Hale, 630.

As rape is a capital offence, the magistrate before whom the examination takes place has no power to bail the party accused, but must commit him, as in all other capital offences, upon such evidence being produced before him as renders it probable that the crime has been committed.

The party ravished is, in all cases, a competent witness, though the jury, upon the trial, are to judge of the credit due to her testimony. And where the husband is charged with aiding in a rape on his wife, she, contrary to the general rules of evidence, may be examined as a witness against him.*

This detestable crime has been, in most countries, punished with death. It was so punished by the Jewish law, in case the damsel was betrothed to another man.† By the civil law it is punished with death and the confiscation of goods.‡ It is now a capital offence by the laws of England, and by the statute of this Commonwealth before cited.

It is not requisite, in this place, to discuss the evidence necessary to prove the guilt of the perpetrator of this crime. It depends upon the circumstances of each case, and cannot be reduced to rules. Whoever may have occasion to understand the present state of the law upon this subject, must consult the treatises of Coke, Hale, Hawkins, Blackstone, East, Chitty, and a book lately published upon the law of crimes by Russell. He will, in these books, find the whole subject amply treated and explained.

There are, however, some general rules, which it will always be safe to observe. It is said by Lord Hale, that this accusation is easily to be made, hard to be proved, and harder to be defended by the party accused, notwithstanding his innocence; and he adduces two instances, within his own knowledge, where the evidence was most positive against the prisoners, in one of which it was physically impossible that he could be guilty.§ If the prosecutrix be of good fame; if she presently discover the offence, and make search for the offender; if the party accused

* 1 Hale, 629; 1 Harg. St. Tr. 388.

† Deut. xxii. 25.

‡ 4 Bla. Com. 210.

§ 1 Hale, 635, 636.

flee ; these and the like circumstances give greater probability to her evidence ; but, on the contrary, if she be of evil fame, and stand unsupported by others ; if she conceal the injury for any considerable time after she has opportunity to complain ; if the place, where the fact was alleged to be committed, be where it was possible she might have been heard, and she make no outcry ; to which ought to be added another circumstance equally strong, if the prosecutrix voluntarily continue her acquaintance and familiar or friendly intercourse with the accused, after the fact, without instituting a prosecution against him, these and the like circumstances carry a strong, but not a conclusive presumption that her story is fictitious.*

A rape upon children under the age of ten years, whether with or without their consent, was made a capital offence as early as the reign of Queen Elizabeth ; and the statute of this Commonwealth,† which enacts, “that if any person shall unlawfully and carnally know and abuse any woman child under the age of *ten years*,” shall suffer the punishment of death, is in the very words of the statute of 18th Elizabeth, c. 7, s. 4. It is said that the carnal knowledge of infants under the age of ten years, seems rather to be a new felony, created by statute, than a rape, which implies a carnal knowledge against the will of the party.‡ Under the statute above quoted, the consent or resistance of the infant is altogether immaterial.§ In drawing the complaint upon the statute, the words of it, to wit, “feloniously, unlawfully, and carnally knew and abused” the party injured, being under the age of ten years, must be used, omitting the word “ravished,” which implies violence.||

As to the testimony of the party aggrieved, if the rape be charged to be committed upon an infant under the age of ten years, the rule adopted as to the admissibility of children, in other cases, is applicable to this, viz. that the admissibility of chil-

* 1 Hale, 633 ; 4 Bla. Com. 213.

† Statute 1805, chap. 97.

‡ 1 East, P. C. 436.

§ Id.

|| By an additional Statute 1815, chap. 86, the punishment for an assault with intent to commit this offence is increased to confinement to hard labor for any term of years or for life, according to the aggravation of the offence, at the discretion of the court.

dren is regulated, not by their age, but by their apparent sense and understanding.* The law, as now established, resulting from all the cases decided in England, will be found in 1 East, P. C. chap. 10, s. 5; the sum of which is, that children of any age may be examined upon oath, if capable of distinguishing between good and evil; but that they cannot be examined, in any case, without oath.†

Form of a Complaint for a Rape.

A. B. of &c., upon his oath complains, that C. D., late of &c., on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., in the peace of the said Commonwealth then and there being, violently and feloniously did make an assault; and her the said E. F. then and there feloniously did ravish and carnally know, by force and against her will; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For carnally knowing and abusing a Female Child, under the Age of ten Years.

A. B. of &c., upon his oath complains, that C. D. of said B., laborer, on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, in and upon one E. F., spinster, a woman child under the age of ten years, to wit, of the age of nine years, in the peace of said Commonwealth then and there being, feloniously did make an assault, and her the said E. F. then and there wickedly, unlawfully, and feloniously did carnally know and abuse; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* Phil. Evid. 15, and cases there quoted.

† Phil. Evid. 15.

RESCUE.

RESCUE is the forcibly freeing another from an arrest or imprisonment; and is generally the same offence in the stranger committing it, as it would have been in a gaoler to have permitted a voluntary escape. A rescue, therefore, of one apprehended for felony, is felony; and for a misdemeanor, a misdemeanor.* To constitute a rescue, the party rescued must be in actual custody. A prisoner, who breaks gaol, may be arraigned for that crime before he is convicted of the crime for which he was originally committed; but a stranger, or third person, who rescues a felon, cannot be found guilty before the felon is convicted.†

The complaint must set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question.‡

Form of a Complaint for rescuing a Person in Custody of a Constable, under a Justice's Warrant.

A. B. of B. &c., upon his oath complains, that C. D. Esq., then and now one of the justices of the peace, in and for the county of S., duly qualified and empowered to perform the duties of that office, did make his certain warrant in writing, under his hand and seal, directed to any of the constables of the town of in the county aforesaid, by which said warrant the constables aforesaid were commanded to take the body of E. F., late of &c., and bring him before the said C. D. to be examined concerning an assault said to have been made and committed by him the said E. F. upon one G. H. of &c., which said warrant was afterwards, to wit, on &c. at &c., delivered to one I. J., one of the constables of the said town of duly appointed and qualified to discharge and perform the duties of that office, to be by him executed in due form of law; and that the said I. J., so being constable as aforesaid, afterwards, to wit, on at &c. aforesaid, by virtue of the said warrant, did take and arrest the said E. F. for the cause aforesaid; and him the said E. F. the said I. J. in his custody, by virtue of said warrant, then and there had; and that the said

* 4 Bla. Com. 131; 1 Mass. Laws, 219.

† Hawk. b. 2, c. 21, s. 8. ‡ Id. s. 5.

E. F., late of &c., and K. L., late of &c., well knowing the said E. F. so to be arrested as aforesaid, afterwards, to wit, on the said day of at B. aforesaid, with force and arms, in and upon the said I. J., the constable aforesaid, then and there being in the peace of the said Commonwealth, and in the due and lawful execution of his said office, did make an assault, and him the said I. J. did then and there beat and abuse, and that the said K. L. him the said E. F., out of the custody of him the said I. J., and against the will of the said I. J., then and there unlawfully did rescue and put at large, to go whither he would; and that the said E. F. himself, out of the custody of the said I. J., and against his will, then and there unlawfully did rescue and escape at large to go where he would; to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For rescuing Goods distrained for Rent.

A. B. of B. &c., upon his oath complains, that on at &c., in due form of law, he took and distrained one chest of draws, of the value of four dollars, and one feather bed, of the value of seven dollars, of the goods and chattels of one C. D., then being in a certain lodging room in the dwelling-house of him the said A. B., situate in the said town of B. and county aforesaid, which same distress was taken by him the said A. B., for the sum of ten dollars, being the sum due for rent, for one whole year, in arrear from the said C. D. to him the said A. B. for the lodging aforesaid; and that the said A. B. the said goods and chattels then and there had and detained in his custody for the cause aforesaid; and the said A. B., upon his oath aforesaid, further complains, that E. F., late of said B., in the county of S., yeoman, afterwards, to wit, on the said day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, the said goods and chattels, so as aforesaid by him the said A. B. taken and distrained, and in the custody of him the said A. B. then and there being, from and out of the custody, and against the will of him the said A. B. then and there unlawfully and injuriously did rescue, take, and carry away; the said sum of ten dollars for the rent in arrear, as aforesaid due, nor any part thereof being paid; and other wrongs then and there did; to the great damage of the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

A RIOT is a tumultuous disturbance of the peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist each other against any who shall oppose them, in the execution of some enterprise of a private nature ; and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.*

Therefore to constitute a riot, it is necessary that three persons, at least, should unite ; and if a number of persons be charged with a riot, and all be acquitted but two, unless they are charged to have been associated with others unknown, no judgment can be given against the two that are convicted.† To constitute a riot, the parties must act without any authority to give color to their proceedings ; for a sheriff, constable, or even a private individual, is not only permitted, but enjoined to raise a number of people to suppress enemies or rioters. The intention also, with which the parties act, must be unlawful. For if a sudden disturbance arise among persons met together for an innocent purpose, they will be guilty of an affray only. But if they form parties, and engage in any violent proceeding, with promises of mutual assistance ; or if they are impelled, by a sudden disposition, to demolish a house or other building, there can be no doubt they are rioters, and will not be excused by the propriety of their original design.

The enterprise must be accompanied with some offer of violence, either to the person or possessions of some individual, as by beating him, or forcing him to quit the possession of his lands or goods ; and hence it follows, that persons riding together with unusual weapons, or otherwise assembling together in such a manner as will naturally excite terror in the people, without any offer of violence to the person or possessions of another, are not

* Hawk. b. 1, c. 65, s. 1.

† See an act of Assembly of Pennsylvania, passed 1706, as to riots. See also Read's Digest, 344 ; Hawk. b. 1, c. 65, s. 3.

guilty of a riot, but only of an unlawful assembly. Transactions accompanied with actual force or violence, or at least with an apparent tendency thereto; and which are apt to strike terror into the people, as to the show of armor, threatening speeches, or turbulent gestures, will amount to a riot; for every such offence must be laid to be done *to the terror of the people*.

The injury to be redressed must be of a private nature, and such as relates to the interests or disputes of particular persons; as to obtain possession of lands, the title to which is in dispute.* And it is not material whether the act intended to be done by such an assembly be lawful or unlawful; from whence it follows, that if more than three persons assist a man to make a forcible entry into lands, to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together to remove a nuisance, which may be lawfully done in a peaceable manner, they are as much rioters, as if the act intended to be done by them was unlawful; for the law does not suffer persons to seek redress of their private wrongs by dangerous disturbances of the public peace.†

By a statute of Massachusetts of the 28th of October, 1786, (called "the riot act,") it is enacted, "that if any persons, to the number of twelve, or more, being armed with clubs or other weapons, or if any number of persons, consisting of thirty or more, shall be unlawfully, riotously, routously, or tumultuously assembled, any justice of the peace, sheriff, or deputy sheriff of the county, or constable of the town, shall, among the rioters, or as near to them as he can safely come, command silence while proclamation is making, and shall openly make proclamation," in the form of words given in the statute; "and if such persons, assembled as aforesaid, shall not disperse themselves within one hour after proclamation made, or attempted to be made as aforesaid, it shall be lawful for every such officer to command sufficient aid; and he shall seize such persons, who shall be had before a justice of the peace, &c.;" and by the statute the justices and other officers are further empowered to

* Hawk. b. 1, c. 65, s. 4, 6.

† Hawk. b. 1, c. 65, s. 7.

require the aid of a sufficient number of persons in arms, if any of the rioters appear with arms; and if any of the rioters shall be killed or wounded by reason of his resistance of the officers, the officers and their assistants shall be held guiltless. The act provides other penalties for refusing to assist the officers, and for the unlawfully continuing together of the rioters for an hour after proclamation is made.

This statute is copied substantially, and (as it respects the description of the offence,) nearly in the words of the statute of 1 Geo. I. st. 2, c. 5; also called "the riot act," which latter statute makes the offence capital; the penalties of former statutes having been found insufficient to restrain the rage of the populace from breaking out into dangerous tumults, whenever they think they are oppressed by any real or pretended grievance.*

A rout is a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof. And it agrees with a riot, as to all the particulars necessary to constitute that offence, except only in this, that it may be a complete offence without the execution of the intended enterprise.†

An unlawful assembly is a disturbance of the peace by persons barely assembled together, with an intention to do a thing which, if it were executed, would make them rioters; but neither actually executing it, nor making a motion towards the execution of it. This definition Hawkins thinks to be much too narrow, and adds, "that any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the public peace, and raise fears and jealousies among the people," seems properly to be called an unlawful assembly—for no one can foresee what may be the event of such an assembly.‡

At common law, sheriffs and other peace officers are both permitted and required to do all in their power towards suppressing a riot, and to call upon others for assistance, which it is their duty to render. Private individuals, also, may arrest the progress of those who are coming to assist or join in the tumult.§

* Hawk. b. 1, c. 65, s. 56. † Id. s. 8. ‡ Id. s. 9. § Id. s. 11.

The following are forms of complaints for the crimes of riots, routs, and unlawful assemblies

For a Riot and Assault.

A. B. of B., &c. upon his oath complains, that C. D., E. F., and G. H., all of &c., laborers, together with divers other evil disposed persons, to the number of ten, whose names to him the said A. B. are as yet unknown, on the day of &c., with force and arms, at B aforesaid, in the county aforesaid, did unlawfully, riotously, and routously assemble and gather together, to disturb the peace of the said Commonwealth; and being then and there so assembled and gathered together, in and upon one I. J., in the peace of the said Commonwealth then and there being, unlawfully, riotously, and routously did make an assault, and him the said I. J. did then and there unlawfully, riotously, and routously beat, wound, and ill treat, so that his life was thereby greatly endangered; and other wrongs then and there unlawfully, riotously, and routously did and committed; to the great damage of him the said I. J., to the great terror of the people, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Riot, Assault, and False Imprisonment.

[The same form as in the next preceding precedent, until you come to the words, "so that his life was thereby greatly endangered," after which add,] and him the said A. B., then and there, with force and arms, unlawfully, riotously, routously, and injuriously, against the will of him the said A. B., and contrary to the laws of this Commonwealth, without any legal warrant, authority, or justifiable or probable cause whatsoever therefor, did imprison and detain in prison, for the space of six hours then next following, and other wrongs to the said A. B. they the said C. D., E. F., and G. H., then and there, unlawfully, riotously, and routously did and committed; to the terror of the people, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For riotously assembling to prevent the Execution of an Act of the Legislature, relative to the Revenue.

A. B. of B. &c., upon his oath complains, that C. D., E. F., and G. H., together with divers others, to wit, fifty other persons, to him the said A. B. unknown, being riotous persons and disturbers of the peace, on at &c., unlawfully, riotously, and tu-

multuously did assemble and gather together to disturb the peace of the said Commonwealth, and with an intent unlawfully and tumultuously to obstruct and hinder the execution of a certain act or law of the Legislature of this Commonwealth, made and passed on the day of &c., entitled "An act" &c. [*set out the title of the act,*] and being so assembled and gathered together, the said C. D., E. F., and G. H., and the said other persons, to the said A. B. unknown, then and there unlawfully, riotously, and tumultuously remained and continued together, making great noise, and committing great violences and disturbances for the space of four hours; to the great terror of the people, to the evil example of all others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Riot in the Theatre, and preventing the Performance of the Play.

A. B. of B. &c., upon his oath complains, that C. D., E. F., and G. H., together with other evil disposed and riotous persons, to the number of twenty, to the said A. B. unknown, on at &c., with force and arms, unlawfully, riotously, and tumultuously did assemble and gather together to disturb the peace of said Commonwealth, at and in a certain theatre in B. aforesaid, called the Boston Theatre, and being so assembled and gathered together in the said theatre, then and there made and raised, and caused and procured to be made and raised a great noise, riot, tumult, and disturbance, in order to obstruct, and for the purpose of obstructing, preventing, and hindering the performance of the exhibition of a certain play, called "the Merchant of Venice," in the said theatre, which said play was appointed by the managers of said theatre to be then and there acted and performed at and in the said theatre on that day, according to public notice thereof in that behalf given; they the said managers of said theatre, then and there having lawful power, license, and authority for that purpose; and that the said C. D., E. F., G. H., and the said other persons, to the said A. B. unknown, did then and there, with force as aforesaid, unlawfully, tumultuously, and riotously obstruct, prevent, and totally hinder the said play from being then and there acted and performed at and in the said theatre; to the great terror of the people, and of the persons then and there peaceably assembled and composing the audience at and in the said theatre, to the great loss, damage, and injury of the said managers of said theatre, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For riotously assembling and hanging the Effigy of a Person.

A. B. of B. &c., upon his oath complains, that C. D., E. F., and G. H., together with divers other evil disposed and riotous persons, to the number of twenty, to the said A. B. unknown, being of unruly and turbulent tempers and dispositions, and unlawfully, wilfully, and maliciously intending to disquiet and terrify one I. J., on at &c., with force and arms, unlawfully, tumultuously, and riotously did assemble and meet together to break and disturb the peace of said Commonwealth, and being so assembled as aforesaid, a certain wooden gallows, in the highway there and near to the dwelling-house of the said I. J. unlawfully, tumultuously, riotously, and maliciously did erect; and a certain figure, resembling a man, as and for the effigy of the said I. J., then and there unlawfully, maliciously, and riotously did hang and affix to the said gallows; and did then and there threaten the said I. J. to hang him up alive, and did then and there, for the space of three hours, make a great noise and disturbance of the peace; to the great terror of the said I. J. and of the people there and thereabouts residing and inhabiting, to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Riot and pulling down an Out-House.

A. B. of B. &c., upon his oath complains, that C. D., E. F., and G. H., together with other evil disposed and riotous persons, to the number of ten, to the said A. B. unknown, on at with force and arms, to wit, with sticks, staves, and other offensive weapons, did unlawfully, riotously, and routously assemble and gathered together to disturb the peace of said Commonwealth; and being so assembled and gathered together, a certain building and out-house, in the possession and lawful occupation of him the said A. B., then and there unlawfully, riotously, and routously did pull down, remove, break, and destroy, and other wrongs then and there did; to the great disturbance and terror of the people there residing, to the great damage of him the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Riot in a House, and assaulting a Lodger.

A. B. of B. &c., upon his oath complains, that C. D., E. F., and G. H., together with divers other evil disposed and riotous

people, to the number of six, to the said A. B. yet unknown, on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, riotously, and routously assemble and gather together to disturb the peace of the said Commonwealth, and being so assembled and gathered together, the dwelling-house of him the said A. B. there situate, then and there unlawfully, riotously, and routously did break and enter, and then and there unlawfully, riotously, and routously did make a great noise, riot, and disturbance, in the said dwelling-house, and then and there unlawfully, riotously, and routously, in and upon one I. J., a lodger in said dwelling-house, in the peace of the said Commonwealth then and there being, an assault did make, and him the said I. J. then and there unlawfully, riotously, and routously did beat, wound, and abuse, so that his life was thereby greatly endangered, and other wrongs then and there unlawfully, riotously, and routously did and committed; to the great terror of the people, to the great damage of him the said I. J., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For riotously attacking a Dwelling-House, breaking the Windows, &c.

A. B. of B. &c., upon her oath complains, that C. D., E. F., and G. H., together with divers others to the number of twenty, to the said A. B. unknown, being evil disposed and riotous persons, and disturbers of the peace of said Commonwealth, on &c., with force and arms, to wit, with clubs, staves, stones, and other dangerous and offensive weapons, at B. aforesaid, in the county aforesaid, the dwelling-house of her the said A. B. there situate, in the night time, unlawfully, riotously, and routously did attack and beset, and did then and there unlawfully, riotously, routously, and outrageously make a great noise, disturbance, and affray, near to and about the dwelling-house of her the said A. B. there situate, and did unlawfully, riotously, and routously continue near to and about the said dwelling-house, making such noise, disturbance, and affray, for the space of two hours, and the windows of the said dwelling-house did then and there unlawfully, riotously, and routously, with the dangerous and offensive weapons aforesaid, break, destroy, and demolish; to the great damage, terror, and dismay of her the said A. B., and of her family, in the dwelling-house aforesaid then and there lawfully being, to the great terror of the people of said Commonwealth, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For riotously breaking a Dwelling-House and removing Goods.

A. B. of B. &c., spinster, upon her oath complains, that C. D., E. F., G. H., and divers other evil disposed persons, to the number of twenty, to her the said A. B. as yet unknown, on &c., with force and arms, at B. aforesaid, did unlawfully, riotously, and routously assemble and meet together to disturb the peace of said Commonwealth, and being so assembled and met together, the dwelling-house of her the said A. B. did then and there unlawfully, riotously, and routously break and enter, and in and upon her the said A. B., in the peace of the said Commonwealth then and there being, unlawfully, riotously, and routously did make an assault, and her the said A. B., in her dwelling-house aforesaid, unlawfully, riotously, and routously did beat, wound, and ill treat; and then and there unlawfully, riotously, and routously did put, cast, fling, and throw divers goods and chattels, to wit, [*here enumerate the goods,*] of her the said A. B., of the value of twenty dollars, then being in the dwelling-house aforesaid, from and out of the same, and thereby greatly damaged, injured, and broke in pieces the said goods and chattels, and other wrongs then and there did; to the great terror of the people of said Commonwealth, to the great damage of her the said A. B., and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For a Riot, by twelve Persons remaining an Hour after Proclamation read: On the Statute of 28th October, 1786,

A. B. of B. &c., upon his oath complains, that C. D., E. F., G. H., and divers other persons, to the number of *twelve* and more, to the said A. B. unknown, on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, unlawfully, riotously, and tumultuously did assemble and meet together, to the disturbance of the public peace, and that afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, I. J. Esq., then being one of the justices of the peace in and for the said county of S., duly and legally qualified and empowered to discharge and perform the duties of that office, did then and there come, as near as he safely could, to the said C. D., E. F., and G. H., and the said other persons, to the number of twelve and more, to the said A. B. unknown, being then and there so assembled to disturb the public peace as aforesaid, and with a loud voice he the said I. J. Esq. did then and there command silence to be had while proclamation was making; and the said I. J. Esq., after that, did then and there open-

ly, and with a loud voice, make proclamation, according to the form of the statute in such case made and provided, in these words following, that is to say, "Commonwealth of Massachusetts. By virtue of an act of this Commonwealth, made and passed in the year of our Lord one thousand seven hundred and eighty-six, entitled, 'an act for the suppressing routs, riots, and tumultuous assemblies, and the evil consequences thereof,' I am directed to charge and command, and I do accordingly charge and command all persons, being here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains inflicted by the said act. God save the Commonwealth." And the said A. B., upon his oath aforesaid, doth further complain, that the said C. D., E. F., and G. H., and said divers other persons, to the number of twelve and more, to the said A. B. unknown, afterwards, to wit, on the same day of in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, notwithstanding the said proclamation was openly made as aforesaid, did then and there unlawfully, riotously, and tumultuously, and to the disturbance of the public peace, remain and continue together, by the space of one hour after such command made by the said proclamation as aforesaid; to the great terror and disturbance of the quiet and peaceable citizens of the said Commonwealth, against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

SABBATH-BREAKING.

THE profanation of the sabbath has been punished by our English ancestors as an offence against God and religion, ever since the time of the Saxon kings; and by the fathers of New-England, ever since the settlement of the country. The excellent remarks of Sir William Blackstone upon this subject should be written in the heart of every American. "Besides," he observes, "the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping of one day in seven

holy, as a time of relaxation and refreshment, as well as of public worship, is of admirable service in a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the people, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit ; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness ; it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens, but which would be worn out and defaced by an unremitted continuance of labor without any stated times of recalling them to the worship of their Maker."

Perhaps there is no country where the institutions of public worship are better supported, improved for more rational purposes, or where the good effects of them are more extensively and beneficially realized, than in New-England. Yet even here, there is much to regret, and much to be corrected. Some of our citizens, whose condition in life renders their example of importance to the community, think themselves *too wise* to be instructed or improved by a regular attendance upon the public worship of their Maker and constant Benefactor. Others have too much refinement to expect any *entertainment* from the pulpit ; that is, they would attend public worship, as they attend the theatre, to be entertained and amused by the performer. Indeed one of the greatest evils and follies of the present day, is a disposition in the people to be dissatisfied and to quarrel with their minister upon trifling occasions and for trivial causes. This is a *growing* evil, and is, in a greater or less degree, the parent of much needless disaffection, animosity, and demoralization, so unpardonable, and even *childish*, in a christian community. It would seem that people of this character think their minister, not their Maker, to be the object of their worship ; thus verifying the remark of a sensible foreigner, after a visit to New-England, who, being asked if the people in that country were not very religious, replied, that " he heard a great deal about the ministers, but nothing at all about religion." *The greatest phenomenon in the history of mankind is their contemptible, and at the same time furious and bloody disputes about religious trifles.*

The sentiments expressed in the preamble of the statute of this Commonwealth, "providing for the due observation of the Lord's day,"* are a most excellent guide to the feelings and duties of every good citizen. They represent the institution of the sabbath "as highly promotive of the welfare of the community, by affording necessary seasons for relaxation from labor, and the cares of business; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct; for public and private worship of the Maker, Governor, and Judge of the world; and for those acts of charity which support and adorn a christian society;" and they reprobate the abuse and profanation of these institutions, as tending to produce "dissipation of manners and immoralities of life." Let these liberal and sublime principles and directions be adopted by every American, as rules for the manner in which the sabbath and all its institutions shall be observed.

It is said to be no offence, at common law, to sell goods on Sunday; but publicly keeping an open shop for the sale of goods, or of meat, is indictable as a nuisance.† In Pennsylvania, the sale of all kinds of spirituous liquor, at or near to places of public worship, is prohibited by statute.—Purdon. Ab. 11 Ed. 576. A justice of the peace, who has an imperfect view of persons at work on Sunday cannot forcibly enter the premises where the offence was committed, to obtain testimony to convict the offenders.—1 Sarg. and Raw. Rep. 347.

The following is an abstract of the several provisions of the statute of Massachusetts providing for the due observation of the Lord's day. By the first section of the statute, "no person shall keep his shop, ware-house, or work-house open, nor shall, upon land or water, do any manner of labor, business, or work, (works of necessity and charity only excepted,) nor be present at any concert of music, dancing, or any public diversion, show, or entertainment, nor use any sport, game, play, or recreation, on the Lord's day, or any part thereof."

* Stat. 1791, chap. 58.

† 4 Bla. Com. 63; Hawk. b. 1, c. 6, s. 6.

By the second section, "no traveller, drover, waggoner, teamster, or any of their servants, shall travel on the Lord's day, or any part thereof, except from necessity or charity."*

By the third section, "no vintner, retailer of strong liquors, innholder, or other person keeping a house of entertainment, shall entertain or suffer any of the inhabitants of the respective towns where they dwell, or others, not being travellers, strangers, or lodgers in such houses, to abide and remain in their houses or yards, orchards or fields, drinking and spending their time, either idly or at play, or doing any secular business on the Lord's day, or any part thereof."

The fourth section, after a preamble which recognises and declares the liberal sentiments of the legislature towards those who differ in opinion as to the time "commanded in the scriptures to be observed as holy time," enacts, "that all the regulations of the statute 'respecting the due observation of the Lord's day,' shall be construed to extend to the time included between the midnight preceding, and the sunsetting of the same day."

The fifth section enacts, "that no person shall be present at any concert of music, dancing, or other public diversion; nor shall any person use any game, sport, play or recreation, on the land or water, on the evening next preceding or succeeding the Lord's day; and that no retailer, innholder, or person licensed to keep a public house, shall entertain, or suffer to remain, or be in their houses or yards, or other places appurtenant, any person or persons, (travellers, strangers, or lodgers excepted,) drinking or spending their time on the said evenings."

The sixth section is introduced by a preamble, stating, "that the public worship of Almighty God is esteemed by Christians

* By an act in addition to this statute, 1815, chap. 135, it is provided, that any person who shall be guilty of a breach of this second section of the original act, shall be liable to a penalty, of not less than four dollars, nor more than six dollars and sixty-six cents, to be recovered upon complaint before a justice of the peace, in the county where the offence is committed; or by presentment of the grand jury, before the Court of Common Pleas, in the same county; and by a *proviso*, in this additional act, all prosecutions for the said penalty shall be commenced within six months after the offence is committed, unless the offender resides without the Commonwealth.

an essential part of the due observation of the Lord's day, and that it requires the greatest decency and reverence for a due performance of the same," and enacts, "that any person, being able of body, and not otherwise necessarily prevented, who shall, for the space of three months together, absent him or herself from the public worship of God, on the Lord's day, (*provided* there be any place of worship at which he or she can conveniently or conscientiously attend,") shall pay a fine &c.

The sixth and seventh sections prohibit "rude and indecent behavior within the walls of any house of public worship," and also, the disturbance or interruption, either on the Lord's day, or at any other time, "of any assembly of people met for the public worship of God, within the place of their assembling, or out of it."

The other sections of the statute prohibit the service of writs upon the sabbath, and relate to the powers and duties of tythingmen. The latter provisions of these sections have a more immediate reference to the duties and proceedings of justices of the peace. By the tenth section of the act, tythingmen are "authorized and empowered to enter into any of the rooms and other parts of an inn, or public house of entertainment, on the Lord's day, and the evening preceding and succeeding;" but the object of such visit, or the duty required of the tythingmen is not stated in the statute. The tythingmen are further authorized and empowered by this section, to examine travellers "whom they shall suspect of unnecessary travelling on the Lord's day," and to demand of such travellers their names and the cause or necessity of their travelling; and a penalty is inflicted for refusing to answer, or for giving a false answer to such demand; which penalty is to be recovered by complaint of the tythingman, "before a justice of the peace in the county where the offence is committed," if the delinquent live in such county; otherwise the information is to be given to the grand juror, to be by him laid before the grand jury for their consideration and presentment; and by the thirteenth section of the act, all offences, the penalty for which does not exceed forty shillings, (except the offender lives out of the county in which the offence is committed,) shall be prosecuted

by complaint before a justice of the peace in such county ; but when the offender lives out of the county, he may be prosecuted by presentment as aforesaid, although the penalty does not exceed the last mentioned sum.

The following are forms of complaints for the crime of sabbath-breaking.

For keeping an open Shop on the Lord's Day.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of and continually afterwards, until the day of exhibiting this complaint, was, and yet is a common sabbath-breaker, and profaner of the Lord's day ; and that the said C. D. on the said day of being Lord's day, and on divers other days and times, being Lord's days, during the time aforesaid, did keep a common and open public shop, and in the said shop did then and there, and on the said other days and times, being Lord's days, there openly and publicly sell, and expose to sale, flesh meat, to divers persons to the said A. B. unknown ; to the common nuisance of all the citizens of said Commonwealth, against the peace and dignity of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

For working on the Lord's day : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of now last past, being Lord's day, at B. aforesaid, not regarding the duties and solemnities of the said day, and the due observation of the same, did then and there do and perform certain labor, business, and work, to wit, [*here state what the work was,*] the said labor, business, and work, not being works of necessity or charity ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* This is an offence at common law, as well as by statute ; the complaint therefore concludes as well at common law, as upon the statute.—1 Hawk. b. 1, c. 6, s. 6.

For being present at a public Diversion on the Lord's Day: On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of &c., being Lord's day, at B. aforesaid, not regarding the duties of said day, and the solemnities thereof, was voluntarily present, on the said Lord's day, at a certain public diversion, called [*here state what the diversion was ;*] to the great scandal of religion, against good morals and good manners, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

Against a Drover for travelling and driving a Drove of Cattle on the Lord's Day: On the Second Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of being Lord's day, at B. aforesaid, not regarding the duties and solemnities of the said day, nor the due observation of the same, did travel on the said day, and did drive and cause to be driven, on the said Lord's day, a large collection and drove of oxen, cows, sheep, and other animals, through the public street and highway in the said town of B., which travelling and driving of the said oxen, cows, sheep, and other animals, on the said Lord's day, in and through the street and highway aforesaid, by the said C. D., was not from necessity or mercy ; to the great annoyance and disturbance of the quiet and well disposed citizens of the said town of B., "*to the common nuisance of all the citizens of said Commonwealth,*"† against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Traveller, for unnecessary Travelling on the Lord's Day: On the Second Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person regardless of the duties and solemnities of the sabbath, and of the due observation of the same, on the day of &c., being Lord's day, at B. aforesaid,

* This form will answer for any of the other breaches of the latter part of the first section of the act, by alleging, specially, what the show or entertainment was, and what sport, game, play, or recreation was used.

† These words are not necessary.

did travel on the said Lord's day, with the horse and chaise of him the said C. D., through the public street and common highway in the said town of B., such travelling by him the said C. D., in manner aforesaid, not being from necessity or mercy; to the great annoyance and disturbance of the quiet and well disposed citizens of said Commonwealth, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against an Innholder for entertaining a Town Inhabitant, and suffering him to remain in his House on the Lord's Day: On the Third Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person regardless of the duties and solemnities of the Lord's day, and of the due observation thereof, and being an innholder in the town of B. in the county aforesaid, and duly licensed to keep a house of public entertainment in said town of B., on the day of &c., being Lord's day, at B. aforesaid, did entertain one E. F., being an inhabitant of the said town of B., where he the said E. F. dwells, and did then and there suffer him the said E. F. to abide and remain in his said public house of entertainment, drinking and spending his time idly, and doing secular business on the said Lord's day, in his the said C. D.'s public house of entertainment, he the said E. F. not being a traveller, stranger, or lodger, in said C. D.'s said public house of entertainment; to the evil and pernicious example of others in like case to offend, against good manners and good morals, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Person for abiding and drinking in a public House on the Lord's Day: On the latter Part of the Third Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person of idle and dissolute manners and habits, and regardless of the duties and solemnities of the Lord's day, and of the due observation thereof, on the day of &c., being Lord's day, at B. aforesaid, in the county aforesaid, did unlawfully abide and remain in a certain house of public entertainment there kept by one E. F., and that the said C. D. did then and there, on the said Lord's day, so abide and

remain in the said house of public entertainment, drinking and spending his time idly and at play, in said house of public entertainment, for the space of four hours, he the said C. D. not being a traveller, stranger, or lodger, in said public house ; against good morals and good manners, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

*Against a Person for absenting himself from public Worship :
On the Sixth Section of the Statute.*

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person of idle, dissolute, and immoral habits and manners, and regardless of the duties and solemnities of the Lord's day, and of the due observation thereof, on the day of &c. and for the space of three months together next before that day, at B. aforesaid, in the county aforesaid, did unlawfully absent himself from the public worship of God on the Lord's day, he the said C. D. being then and there, and during all the time aforesaid, a person able of body, and not otherwise necessarily prevented from attending the public worship of God on the Lord's day, and there being then and there, and during all the time aforesaid, a place of public worship, in the said town of B., at which he the said C. D. might and could conscientiously and conveniently attend ; to the great scandal of the christian religion, against good morals and good manners, against the peace of the said Commonwealth, an contrary to the form of the statute in such case made and provided. Wherefore &c.

*For indecent and rude Behaviour within the Walls of a Place
of public Worship : On the Seventh Section of the Statute.*

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person of rude, indecent, and irreligious habits and manners, and regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day on the day of being Lord's day, at B. aforesaid, within the walls of a house of public worship there, did behave rudely and indecently by [*here set forth the rude and indecent behaviour ;*] against good morals and good manners, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For interrupting and disturbing public Worship : On the Eighth Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being a person regardless of the duties and solemnities of the public worship of God, and of the due observation of the Lord's day, on the day of &c., it being Lord's day, at B. aforesaid, with force and arms, did wilfully interrupt and disturb a certain assembly of people there met for the public worship of God, within the place of their assembling, to wit, within the meeting-house of the [first parish] in the said town of B., by making divers loud and indecent noises and tumults, during the performance of divine service in said meeting-house ; to the great injury and insult of the quiet and orderly people then and there assembled in the meeting-house and for the purposes aforesaid, against good morals and good manners, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For refusing to answer a Tythingman, when examined as to the Necessity of Travelling on the Sabbath : On the Tenth Section of the Statute.

A. B. of B. &c., and one of the tythingmen of the said town of B., duly appointed and authorized to discharge and perform the duties of that office, upon his oath complains, that on the day of &c., it being Lord's day, at B. aforesaid, according to the duties of his said office and the requirements of law, he examined one C. D. of &c., gentleman, within the said town of B., whom he then and there had good cause, from the circumstances thereof, to suspect of unnecessary travelling on the said Lord's day, and of his being travelling as aforesaid not from necessity or charity, and that the said A. B., then and there being such tythingman as aforesaid, and in the due and lawful execution of his said office, demanded of him the said C. D. the cause of his travelling as aforesaid upon the said Lord's day, together with his name and place of abode, and that the said C. D. did then and there unlawfully and insolently refuse to give any answer to the said A. B., being then and there such tythingman as aforesaid, to his examination and demand aforesaid, in that behalf so made by him the said A. B. ; against the

peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

SEPULCHRES OF THE DEAD.

THE rights of the sepulchre, and the ashes of the dead, are respected and protected in all countries, savage and civilized; and there is nothing more shocking to the feelings of humanity, than a wanton violation of them. To take up a dead body out of its grave, is an indictable offence at common law, though it be taken up for the purpose of dissection.† There had been several prosecutions and convictions at common law for this offence in the Supreme Court of this state, previous to the late statute made “to protect the sepulchres of the dead;”‡ in which cases, it appearing to the court that the bodies were taken up for the purpose of dissection, a small fine only was inflicted. It was the frequent repetition of this offence which awakened the attention of the legislature to the subject, and induced it to pass the statute abovementioned.

A conspiracy to prevent a burial is also punishable by indictment;§ and it is a misdemeanor to arrest a dead body, and thereby to prevent a burial in due time||. A prosecution at common law, for this offence, was sustained in the Supreme Court of this state before Parsons C. J., at *nisi prius*, in which there was a conviction, and the parties punished by a fine.¶ The dead body of a man was arrested by a civil process, on its way to the burying place; the party proceeding upon a mistaken notion that

* This form may be used in the other case contemplated in this section of the statute, to wit, for giving a “false answer” to such tythingman; in which case it must be alleged what the false answer was, precisely as the fact was.

† 2 T. R. 733; Leach, C. L. (4 ed.) 497; 2 East, P. C. 652; 4 Bla. Com. 236; 1 Hale, 515.

‡ Stat. 1814, chap. 175. § 2 T. R. 734.

|| 4 East, 465; 2 Chit. C. L. 38, note.

¶ Commonwealth v. Snow & al. in the county of Barnstable.

he was entitled to the body of his debtor after death. If the indictment in this case had been for a conspiracy to prevent the interment of the deceased person, (as it appears by the decision in 4 East, 465, it might have been,) the punishment might have been much more severe.

By the statute of Massachusetts, above quoted, it is enacted, "that if any person, not being authorized by the board of health, or the selectmen of any town in this Commonwealth, shall knowingly and wilfully dig up, remove, or carry away, or aid or assist in digging up, removing, and carrying away any human body, or the remains thereof," such person, upon conviction before the Supreme Judicial Court, shall be punished by fine or imprisonment. And by the second section of the act, the same penalties are inflicted upon "any person or persons who shall knowingly and wilfully receive, conceal, or dispose of any human body, or the remains thereof, which shall have been dug up, removed, or carried away, in the manner described in the first section of this act." There is a *proviso* in this section, that the act shall not be so construed "as to affect the power or authority, in the courts of the United States, or of this Commonwealth, or of any person acting under the authority of the same, in removing or disposing of the bodies of persons executed, pursuant to any sentence of such court." The fines accruing under the act are appropriated and "enure, one half to the informer, and one half to the town, in which the offence is committed."

Several convictions have taken place in prosecutions founded upon this statute; in two of which, where the party accused was a respectable physician, the fine in each case was set at six hundred dollars. The cases, however, were considered to have been attended with circumstances highly aggravated and extremely distressing to respectable individuals.

The following are forms of complaints for the crime of digging up and removing dead bodies.

At common Law, for digging up and carrying away a Dead Body out of a Church-Yard.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, the common burying ground [or church-yard, as the case may be,] belonging to the [first parish] in said town of B. there situate, unlawfully, voluntarily, knowingly, and wilfully did break and enter, and the grave there, in which one E. F., deceased, had lately before been interred, and there was and remained, unlawfully, voluntarily, knowingly, wilfully, and indecently did dig open, and afterwards, on the same day and year aforesaid, at B. aforesaid, the body of her the said E. F., out of the grave aforesaid, unlawfully, voluntarily, knowingly, wilfully, and indecently did take and carry away; to the great indecency of christian burial, and against the peace and dignity of the Commonwealth aforesaid. Wherefore &c.

For digging up and removing a Dead Body without Permission, &c.: Upon the First Section of the Statute of 1814, chap. 175.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, the common burying ground belonging to the [first parish] in the said town of B. there situate, unlawfully, knowingly, and wilfully did break and enter, and the grave there, in which a certain human body, to wit, the body of one E. F., had lately before been interred, and there was, unlawfully, knowingly, and wilfully did open, and the said body of her the said E. F., and the remains thereof, then and there in the grave aforesaid being, unlawfully, knowingly, and wilfully did dig up, remove, and carry away from and out of the grave aforesaid; he the said C. D. then and there not being authorized so to do, either by the board of health, or the selectmen of the said town of B., in which the said grave and the burying ground aforesaid was and is situate; to the great indecency of christian burial, to the great grief and distress of the surviving friends and relatives of the said E. F., against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

under the laws of the said state of from which he fled, owe service and labor to him the said C. D., that your honor will give and grant him a certificate thereof, to authorize and empower him to remove the said E. F. to the state from which he fled, as before stated. Dated at the city of B., in the said state of Massachusetts, this day in the year of our Lord, &c. C. D.

Form of a Justice's Certificate, upon such Application.

United States of America.

Massachusetts District ss.

(L. S.) To all people to whom this present Certificate shall come.

Know ye, that on the day of [*here insert the application of the claimant for the certificate, at large.*]

Whereupon, upon due inquiry, and legal proof being made to me the said justice, and to my satisfaction, that the facts stated by the said C. D., in his said application, are true, and the premises by me the said justice being fully understood, I do hereby, in pursuance of the law of the United States, entitled "an act respecting fugitives from justice, and persons escaping from the service of their masters," give and grant to the said C. D. a certificate thereof, to wit, that the said E. F., the person named in the said application of the said C. D. doth, under the laws of the said state of owe labor and service to him the said C. D., and that he hath escaped from the said state of into the said state of Massachusetts, and that the said C. D. is authorized, and hath sufficient warrant, by virtue of the statute aforesaid, to remove the said E. F. from the said state of Massachusetts, to the said state of from which he fled.

Given under my hand, and the seal of my office, at the city of Boston, in the said state of Massachusetts, this day of in the year of our Lord &c.

A. B., *Justice of the Peace for the county of Suffolk and state of Massachusetts.*

SURETY OF THE PEACE, AND GOOD BEHAVIOR.

It is said to be an honor to the English laws, and almost peculiar to them, that they furnish the means of *preventing* the commission of crimes and misdemeanors. The *preventive* justice consists in obliging those, whom there is probable ground to suspect of future misbehavior, to stipulate with, and give full assurance to the public, that such offence as is apprehended, shall not be committed, by finding pledges or securities for keeping the peace, or for their good behavior.*

The latter writers upon this branch of the duty of a magistrate have collected their remarks, and taken their directions, principally from Hawkins's Pleas of the Crown. The most simple division of the subject is in 4 Blackstone's Commentaries,† who considers, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

1. This security consists in being bound, with one or more sureties, in a recognisance or obligation to the government, taken by some court or some judicial officer, and entered on record; whereby the parties acknowledge themselves to be indebted to the government in the sum required, with condition to be void and of no effect, if the party shall appear at court on such a day; and in the mean time shall keep the peace, either generally towards all the citizens of the Commonwealth, and particularly also towards the person who craves the security; or if it be for the good behavior, then on condition that he shall be of the good behavior, either generally or specially, for the time therein limited. This recognisance if taken by a justice of the peace, must be taken for, and certified to the next session of the court to which it is made returnable;‡ and if the condition of such recognisance be forfeited by any breach of the peace in the one case, or any misbehavior in the other, the recognisance becomes forfeited or absolute, and the party and his sureties, having now become the absolute debtors of the government, are sued for the several sums in which they are respectively bound.

* 4 Bla. Com. 248.

† Id.

‡ 4 Bla. Com. 250; 7 M. R. 340.

2. The direct authority of a justice of the peace in this state, to require sureties of the peace and good behavior, is given in the statute of 1783, chap. 49, "vesting certain powers in justices of the peace in criminal cases," which expressly authorizes justices of the peace "to require sureties for good behavior of dangerous and disorderly persons." It is an authority which has also been usually exercised by them at common law, and by the terms of their commissions;* and as to the question, in what cases a surety of the peace ought to be granted, it seems, that any justice of the peace may bind all those to the peace, who in his presence make an affray, or threaten to beat or kill any person; or, (as Hawkins expresses it,) contend together with hot words; or who go about with unusual weapons, to the terror of the people.†

All persons, under the protection of the government, being of sane memory, whether citizens or aliens, have a right to demand surety of the peace; the doubt expressed in the ancient books, whether Jews or Pagans have a right to demand it, seems to be entirely without reason.‡

A wife may demand it against her husband, threatening to beat her; and a husband may have it against his wife.§

There is no doubt but that surety of the peace may be granted against any person whatsoever, being of sane memory, whether he be a magistrate or private person, whether he be of full age or under age. But infants under age, and married women, must find security by their friends, and not be bound themselves; for they are incapable of binding themselves to answer a debt, which is the nature of these recognisances.||

As to the cause for which surety of the peace is to be granted, it is clear, that whenever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do it, he may demand the surety of the peace against such person; and that every justice of the peace is bound to grant it, upon the par-

* 4 Bla. Com. 250.

† Hawk. b. 1, c. 60, s. 1.

‡ Hawk. b. 1, c. 60, s. 2, 3.

§ Id. s. 4.

|| 4 Bla. Com. 251.

ty's giving him satisfaction, upon oath, that he is actually under such fear, and that he has just cause therefor, by reason of the threats of the party complained of, or of his lying in wait for that purpose, and that he does not require it out of malice or ill will towards the other party.* And it is also laid down, that he who is threatened to be imprisoned by another has a right to demand surety of the peace; for every unlawful imprisonment includes an assault and wrong to the person of a citizen.†

As to the manner in which the surety is to be granted, it is said to be certain, that if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offers sureties; and that he may be commanded by word of mouth to find sureties, and committed for his disobedience.‡ This is a common law principle, found in the English authorities. But by the Constitution of this State, no citizen can be lawfully arrested, unless the cause or foundation of such arrest be previously supported by oath or affirmation.§ It is therefore always requisite, that when surety of the peace is granted, it should be supported by complaint, first made and sworn to by the party demanding it, upon which a warrant is to issue against the party complained of; upon which he is to be apprehended and proceeded against, as in other criminal prosecutions; and the same rules heretofore laid down, as to the manner of executing the warrant, returning it, &c. are generally applicable to the proceedings upon a peace warrant.||

Such warrant may, as in other cases, be made returnable before the justice who grants it, or before any other justice of the same county; but it is said that he that makes the warrant "for the most part hath the best knowledge of the matter, and therefore he is the fittest to do justice in the case."¶

The peace warrant may be *superseded*, if the party, who fears that surety of the peace will be demanded against him, find sureties before any other justice of the same county, either before or

* Hawk. b. 1, c. 60, s. 6.

† Id. s. 7.

‡ Id. s. 9.

§ Declaration of Rights, art. 14.

|| See ante.

¶ 5 Co. 59.

after a warrant be issued against him ; and it is said that a *superseedeas* from such justice shall discharge him from arrest from any other justice at the suit of the same party for the same cause.* But this practice having been abused, it gave birth to the statute of 21 Jac. I. c. 8, by which the abuse was corrected, by requiring that, in such case, process should not be granted, unless the proceedings were *bonâ fide*, &c.

The *recognisance*, when taken before a justice of the peace, may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the amount of the sum or penalty, in which the party shall be bound.† But the recognisance cannot be made to continue beyond the term of the next court to which it ought to be made returnable. It cannot, as in England, be made without stating any time or place for the appearance of the party.‡ It was so decided in the case of *the Commonwealth v. Ward*,§ in which case the recognisance taken by the justice was, that the party should keep the peace, and be of the good behavior, “for and during the term of two years from the date.” It was said by the Court in that case, that the justice had wholly mistaken his duty ; for when one is brought before a justice of the peace, on articles of the peace exhibited against him, the justice, if satisfied that there is ground for further proceedings, is to order him to recognise &c. for his appearance at the next Court of Common Pleas, and in the mean time to keep the peace and be of the good behavior towards all the citizens of the Commonwealth, and especially towards the complainant. The reason why the recognisance is to be made returnable to the Court of Common Pleas is, that, in this state, that court now have jurisdiction of the offence of assault and battery, and of certain other offences, concurrently with the Supreme Judicial Court. In other states the recognisance, in these cases, is to be taken for and made returnable to such court as may be invested with such jurisdiction.

Notwithstanding the recognisance, at common law, may be taken without expressing any certain time for which the party

* Hawk. b. 1, c. 60, s. 14.

† Id. s. 15.

‡ Id.

§ 4 M. R. 497 ; Ante.

shall be bound to keep the peace, it is said by Hawkins to be the safest way to bind the party to appear at the next Sessions of the Peace, (or whatever court may have the competent jurisdiction,) and in the mean time to keep the peace towards all the citizens &c., and more especially towards the party complaining.*

3. The recognisance may be *discharged*, by the death of the principal party who was bound thereby, if it were not forfeited before. And it is also said, that it may be discharged by the release of the party at whose complaint it was taken.† But this opinion may be justly questioned, because the recognisance is not given to such complainant, who is not a party to it, but to the government, and consequently cannot be discharged but by the government. Such release, however, will be a sufficient inducement to the court to which it shall be certified, to discharge it. The non-appearance of the party, upon whose complaint it was taken, in order to pray the continuance of it, is a sufficient reason for discharging it.

A recognisance for keeping the peace and being of the good behavior, ought always to be returned and certified to the next Court of Common Pleas, or other court of inferior jurisdiction, having authority to try and decide cases of assault and battery, and other offences of the same nature and degree; and if there declared to be forfeited, such proceedings will be had, as, according to the laws and usages of each particular state, are requisite to recover the penalty of the recognisance. In this state, the Court of Common Pleas and Supreme Judicial Court are vested with civil as well as criminal jurisdiction, and in either court, when the recognisance of a party and his sureties becomes forfeited, a writ of *scire facias* is ordered to issue, in the same courts, to recover the penalty. In the city of Boston, the recognisance may be made returnable to the Municipal Court, and the penalty sued for in the Court of Common Pleas.

As to the forfeiture of a recognisance, and what acts of the party will amount to such a forfeiture, a justice of the peace having no authority to decide upon them, the principles of law,

* Hawk. b. 1, c. 60, s. 16.

† 1d. s. 17.

relative to these cases, are not here stated ; but for a full statement of them, the reader is referred to Hawk. b. 1. c. 60, s. 21, 22, 23, 24, 25, 26, and 27.

Surety for the *good behavior* is made the subject of a distinct chapter by Hawkins, and of a distinct consideration by other writers upon criminal law. It includes security for the peace, and something more.* But it is of such great affinity with surety of the peace, as to the manner in which it is taken, superseded, and discharged, that it does not require a particular consideration, more especially as, according to the uniform practice in this state, the party is bound, in the *same recognisance*, to keep the peace and be of the good behavior. For a full statement of the law upon this subject, the reader is referred to Hawk. b. 1, c. 61, and 4 Burn's J. 269, 283.

*Form of a Complaint and Application to a Justice of the Peace,
for Surety of the Peace, &c.*

A. B. of B. &c., upon his oath complains, that C. D. of &c., hath threatened to beat, wound, maim, and kill him the said A. B., and to do him some bodily harm, and also to burn and destroy the property of him the said A. B., and that he hath just cause to fear, that the said C. D. will beat, wound, maim, or kill him the said A. B., and that he will do him some bodily mischief. The said A. B., therefore, prays surety of the peace and of the good behavior to be granted him against the said C. D. ; and this he doth, not from any private malice or ill will towards the said C. D., but simply because he is afraid, and hath good cause to fear that the said C. D. will beat, wound, maim, kill, or do him some bodily mischief as aforesaid, and that he will burn and destroy his said property. Wherefore the said A. B. prays, that a warrant may issue, in due form of law, against the said C. D., and that he may be dealt with, touching the premises, as to law and justice shall appertain. A. B.

Suffolk ss. On the day of &c., the said A. B. personally appeared and made oath to the truth of the foregoing complaint,

Before me, E. F., *Justice of the Peace.*

* 4 Bla. Com. 253.

Form of a Warrant upon the foregoing Complaint.

Suffolk ss. To the Sheriff of the said County of Suffolk, or his Deputy, or to any of the Constables of the Town of in the County aforesaid. Greeting.

Whereas A. B. of &c., hath personally come before me the subscriber, one of the justices of the peace, within and for the said county of S., and hath made oath that he the said A. B. [*here insert the substance of the complaint*].

These are therefore, in the name of the Commonwealth of Massachusetts, to require you, and each of you, that immediately and without delay, you apprehend the body of him the said C. D., and him bring before me, (or some other justice of the peace within and for the county aforesaid,*) to find sureties, as well for his personal appearance at the next Court of Common Pleas to be holden at B., within and for the said county of S., on the Tuesday of next, as also for his keeping the peace, and being of the good behavior, in the mean time, towards all the citizens of the said Commonwealth, and especially towards the said A. B.

Given under my hand and seal at B., in the county aforesaid, this day of in the year of our Lord one thousand eight hundred and twenty-two.

E. F., *Justice of the Peace.*

SODOMY AND BESTIALITY.

THIS most detestable crime is correctly described in the statute of this Commonwealth of 1804, chap. 133, against sodomy and bestiality, which enacts, "that if any man shall commit the crime against nature with a man or male child, or if any man or woman shall have carnal copulation with a beast," such person "shall be punished by solitary imprisonment for a term not exceeding one year, and by confinement to hard labor, for a term not exceeding ten years." This offence, until the passing of this statute, was punished in this state with death; and is, and al-

* Whether the warrant be made returnable before the justice who grants it, or before any other justice, is matter of discretion in the justice by whom it is granted.

ways has been a capital felony by the common law ; by which, according to some authors, it was anciently punished by burning, and by others by burning alive.* With respect to this crime, it is said the proof ought to be the more clear, as the offence is the more detestable ;† and that the voice of nature and reason, and the express law of God, determine that its punishment shall be capital.‡

Form of a Complaint for Sodomy committed with a Boy : On the Statute of Massachusetts.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid in and upon one E. F., a male child about the age of fifteen, in the peace of said Commonwealth then and there being, feloniously did make an assault, and then and there feloniously and diabolically did commit the crime against nature, by then and there having carnal knowledge of the body of him the said E. F. against the order of nature ; against the peace of said Commonwealth, and contrary to the form of the statute, in such case made and provided. Wherefore &c.

For Sodomy and Bestiality committed with a Beast.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of &c., with force and arms, at B. aforesaid, in the county aforesaid, did commit the crime against nature, by having a certain venereal and carnal intercourse and copulation with a beast, to wit, with a cow, and that he the said C. D. did then and there have carnal copulation with said cow ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

* 4 Bla. Com. 216.

† Id. 215.

‡ Levit. xx. 13—15.

SWEARING PROFANELY.

THIS wicked and contemptible practice is described in elegant and appropriate language in the preamble to the statute of this Commonwealth, "to prevent profane cursing and swearing," which denounces it as a "horrible practice, which is inconsistent with the dignity and rational cultivation of the human mind ; and with a due reverence for the Supreme Being and his providence ; as having a natural tendency to weaken the solemnity of oaths lawfully taken in the administration of justice ; and to promote falsehood, perjuries, blasphemies, and dissoluteness of manners, and to loosen the bonds of civil society."*

The provisions and penalties of this statute appear to have been taken from that of 19 Geo. II. c. 21, with this (nominal) difference, that in our statute the penalty is to be inflicted according to the "quality and circumstances of the offender," but in the English statute it is specially enacted, that a laborer, sailor, or soldier, shall forfeit a shilling for every profane oath or curse ; that every other person under the degree of a *gentleman* shall forfeit two shillings ; and every *gentleman*, or person of superior rank, shall forfeit five shillings.† Perhaps in the republican courts of this country there might be more difficulty in deciding who was *below* and who was *above* the degree of a gentleman, than upon the legal guilt of the culprit !

By the third section of our statute, the prosecution must be commenced within twenty days next after the offence shall have been committed.

Form of a Complaint for profane Swearing.

A. B. of B. &c., upon his oath complains, that C. D. of &c., on the day of at B. aforesaid, in the county aforesaid, being a person who had arrived at the age of discretion, to wit, at the age of twenty years, but regardless of the reverence due to the Supreme Being and his providence, did profanely curse and swear, by uttering with a loud voice, in the presence and hearing of divers citizens of the said Common-

* Stat. 1796, chap. 33.

† 4 Bla. Com. 59.

wealth, these wicked and profane words following, that is to say, [*here set forth the profane oath and curse, in the words in which they were uttered ;*] to the great displeasure of Almighty God, against good morals and good manners, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

THREATENING LETTERS.

THE offence of sending threatening letters without any name, or with a fictitious name, demanding money, *venison*, or other valuable thing, was made a capital offence by a statute of 9 Geo. I. c. 22 ; the provisions of which were extended by a statute of 27 Geo. II. c. 15.† These statutes are not in force in *this state*, not having been adopted here ; and as the offence is not recognised by the common law, nor made punishable by any statute, the security afforded by the law against persons committing it, is by demanding surety of the peace and good behavior against them, which, at common law, every justice of the peace is bound to grant, upon satisfaction given him, upon oath, by any person who has just cause to fear that another will injure his person or property.‡

TREASON.

IN this country, the constitutions and laws have clearly defined the crime of treason, and pointed out the only cases in which it can be committed. In Massachusetts, a law upon the subject, declaring what acts shall be deemed treason, and for regulating

* In prosecutions upon this statute for a second or third offence, the complaint for such second and third offence must set forth and allege the former convictions. See also the form of a record of one or more convictions, upon the information of sheriffs &c., as given in the statute.

† 4 Bla. Com. 144.

‡ Hawk. b. 1, c. 60, s. 6.

the trials and directing the mode of executing judgments against persons attainted of treason and felony, was passed prior to the adoption of the present constitution of that state, and which is now in force, except, perhaps, some of its provisions as to the mode of trial, which may be considered incompatible with one of the articles of the declaration of rights. In this happy country, the crime of treason is seldom mentioned, or even thought of; and so long as the constitution and laws now existing are faithfully administered, it seems impossible to anticipate the time when the folly or depravity of any man will prompt him to attempt their opposition or destruction. Yet as one attempt of this nature,* during the short period of their establishment, has been made, and others in future and more degenerate times, may be expected, a general outline of the law of treason is here drawn; and the patriotic magistrate will recollect, that it is within the scope of his authority and duty, in the first instance, to restrain the offender and secure and commit him for trial.

The history of the crime of treason, in the English government, is, in some instances, most disgraceful to human nature, and shows the savage state of manners, and the capricious and odious tyranny which anciently existed in that nation. This remark is more particularly applicable to the bloody reign of Henry the Eighth, when a man was liable to be drawn to the gallows, there to be hung by the neck; then cut down alive; his entrails to be taken and burned while he was yet alive; his head cut off; his body divided into four parts; and his head and body to be at the king's disposal; for clipping a sixpenny piece, or for *believing* that the king was lawfully married to one of his wives.†

For a full description and analysis of this crime, as it exists at this day in England, the reader is referred to 1 East, P. C. 37 to 138.—4 Bla. Com. 74 to 93,—where he will find, that the heads of the offence relate principally to the king and his family; and, that of the twelve cases enumerated in East, P. C., in which treason may be committed in England, only two of them

* See Minot's History of the Insurrection in Massachusetts.

† 4 Bla. Com. 92, 86.

can be the subject of treason in this country, to wit, that "of levying war against the government, and adhering to its enemies, giving them aid and comfort."

Treason against the United States consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort; and no person can be convicted of treason, unless upon the testimony of two witnesses to the same overt act, or on confession in open court.*

Congress have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.† In legislating upon this provision of the constitution, Congress have enacted, that if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort, within the United States, or elsewhere, and shall be thereof convicted on confession in open court, or on the testimony of two witnesses to the same overt act of the treason, whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death. The same act provides for the punishment of misprision of treason, by imprisonment not exceeding four years, and fine not exceeding one thousand dollars. This misprision of treason is, where any person or persons, having knowledge of the commission of any treason against the United States, shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some one of the judges or justices thereof, or to the president or governor of any particular state, or some one of the judges or justices thereof;‡ and the trial of persons indicted of treason is regulated by the same statute.

What acts constitute or amount to treason, and what is a sufficient *overt act* of levying war, have been the subject of judicial discussion and decision, in the courts of the United States, for which see 2 Dall. Rep. 246, 247, *United States v. Vigol*.—

* Constitution of U. S., chap. 1, sec. 7, art. 3.

† Constitution of U. S. chap. 2, sec. 8, art. 3:

‡ Act of April 30, 1790, 2 vol. Laws U. S. 92.

2 Dall. Rep. 355, *United States v. Mitchell*; and 1 Dall. Rep. 37.

As to what constitutes levying war against the United States, the following points have been decided.

1. There must be an assemblage of persons for the effecting by force a treasonable purpose; enlistment of men to serve against the government is not sufficient.*

2. An assemblage of men to revolutionize by force the government established by the United States in any of its territories, although as a step to some greater projects, amounts to *levying war*.†

3. The meeting of particular bodies of men, and their marching to a place of general rendezvous, is such an assemblage, as constitutes *levying war*.

4. To *levy war*, is to raise, create, or carry on war. And the term "*levying war*," is used in the constitution of the United States, in the same sense in which it was understood in England, and this country, to have been used in the statute 25 Edw. III. from which it was borrowed.‡

In the case of the *United States v. Burr*, 4 Cranch, 471, the meaning of the term "*levying war*," and the facts which amount to the proof of that species of treason, are particularly and minutely stated and discussed, and the points of law arising from them fully considered and settled. To this important and interesting case, therefore, the reader is referred for the learning upon this subject.—See also 1 Dall. Rep. 35, where it was decided that the sending intelligence, without setting forth the particular letter or its contents, is a sufficient allegation in the charge.

In the state of New-York it has been decided, 1. That treason against the United States is not cognisable in the state courts. 2. That the offence of adhering and giving aid and comfort to the enemies of the United States, is not treason against the state of New-York; and 3. That treason may be committed against the state by opposing the laws, or forcibly attempting to over-

* 4 Cranch Rep. 75. † Ibid.

‡ 4 Cranch Rep. 471, *The U. S. v. Burr*.

turn or usurp the government.* For other points of law, relative to the overt acts of treason; the manner of trial; the number of jurors to be summoned; the form of the indictment; the manner of summoning witnesses by the prisoner; the confession of the prisoner, and how far it is evidence in cases of treason; and the manner of inflicting the punishment of death; see the following cases and authorities.—4 Cranch, 490-499.—2 Dall. 341, 342, 343.—2 Dall. 86, *Commonwealth v. M'Carty*.—1 Dall. 35.—4 Cranch, 490, *U. S. v. Burr*, appendix 4.—*Laws U. S.* vol. 2, p. 99.

The statute of Massachusetts against treason, misprision of treason, and for regulating trials in such cases, was passed in seventeen hundred and seventy-seven.† Some of its provisions are rendered inoperative by the constitution of the United States; and in the instance hereafter mentioned, wherein the supreme executive authority is authorized to direct in what county of this state persons accused of treason, committed without the limits of the state, shall be tried, the statute may be considered to be repugnant to the declaration of rights.

The first section of the statute declares who the persons are, that owe allegiance to the state; and by the second section it is enacted, “that all persons, members of, or owing allegiance to this state, as before described, who shall without or within the limits of this state, levy war or conspire to levy war against this state, or against any other of the United States of America; or shall, within or without the limits of this state, be adherent to the enemies of this state, giving to them aid and comfort, within or without the limits of this state, and thereof be proveably attainted of open deed by the people of their condition,” shall be deemed guilty of treason, and suffer the pains of death. By the third section it is enacted, that all persons owing allegiance to any other of the United States, who shall, within this state, levy war against this state or any other of the United States, shall be deemed guilty of treason.

* 11 Johns. Rep. 549.

† 2 Mass. Laws, appendix, 1046, former editions.

The punishment for misprision or concealment of treason is then provided for ; which misprision or concealment of treason is declared to be, when any person who shall know of any treason to have been committed (and is no party to it,) and shall not, within a reasonable time, give information thereof, upon oath, to the justices of the Superior Court &c., or some justice of the peace within this state.

The other provisions of this statute relate principally to the mode in which the trials of the persons accused shall be regulated ; and therefore are not connected with the duty of the magistrate by whom the party may be committed for trial.

By the twenty-fifth article of the declaration of rights, it is declared, "that no subject ought, in any case, or in any time, to be declared guilty of treason or felony, by the legislature."

An act in addition to the act of this state against treason* &c., after reciting that part of the former act which authorizes the supreme executive power of the state to order and direct in what county persons shall be tried for treason committed without the limits of the state, and declaring such provision to be inconvenient, proceeds to enact that such persons shall be tried in the county whereof they are inhabitants, in the same manner as if the treason had been committed in such county. But by the thirteenth article of the declaration of rights, it is declared, "that in all criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen." The provision of this additional act, above referred to, appears to be repugnant to this article of the declaration of rights, and may therefore be considered to be thereby repealed. And the authority given to the executive power by the former act, to direct in what county in this state persons shall be tried for treason committed without the limits of the state, if not repealed by the additional act, would probably be considered to be repugnant to another article of the declaration of rights,† which declares that the *executive* shall never exercise the *judicial* power in the government of this Commonwealth.

* 2 Mass. Laws, appendix, 1052, former edition.

† Article 30.

*Form of a Complaint for Treason, by levying War against the United States.**

A. B. of B. &c., upon his oath complains, that John Fries, late of &c., in the district of Pennsylvania, yeoman, being an inhabitant of, and residing within the said United States, to wit, in the district aforesaid, and under the protection of the laws of the United States, and owing allegiance and fidelity to the said United States, not weighing the duty of said allegiance and fidelity, but wickedly devising and intending the peace of the said United States to disturb, on the seventh day of March in the year of our Lord one thousand seven hundred and ninety-nine, at Bethlehem, in the county of Northampton, in the district aforesaid, unlawfully, maliciously, and traitorously did compass, imagine, and intend to raise and levy war, insurrection, and rebellion, against the United States; and to fulfil and bring to effect the said traitorous compassings, imaginations, and intentions of him the said John Fries, he the said John Fries, afterwards, that is to say, on the said seventh day of March, in the year of our Lord one thousand seven hundred and ninety-nine, at the said county of Northampton, in the district aforesaid, with a great multitude of persons, whose names are unknown to him the said A. B., to a great number, to wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, staves, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said United States; and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner array and dispose themselves against the said United States; and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes aforesaid, he the said John Fries, with the said other persons, so as aforesaid traitorously assembled and armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the United States; contrary to the duty of the allegiance of him the said John Fries, against the peace of the said United States, and contrary to the form of the statute of the said United States in such case made and provided. Wherefore &c.

* This form is taken from the indictment against John Fries, who was tried in the Circuit Court of the U. S. for Pennsylvania District. For other precedents of indictment for treason, see 2 Chit. C. L. 68.

TRESPASS.

No indictment lies at common law for a trespass to land or goods, unless there be a riot or some breach of the peace, or a forcible entry.*

The statute of Massachusetts for "more effectually preventing of trespasses in divers cases," was passed November 23, 1785.† That part of this law which punishes the cutting down or destroying of trees, planted or growing for use, shade, or ornament, is nearly in the words of the statute of 9 Geo. I. c. 22, excepting as to the punishment. By the English statute this offence is punished with death! By our statute it is punished by a fine of not less than *five*, nor more than *forty* shillings. It was probably an allusion to the abovementioned English statute, which gave occasion to a remark recently made relative to the monstrous absurdities in some parts of the English criminal code, that it inflicted the same punishment for the *cutting of a twig*, as for the *assassination of a father*!

The offences intended to be suppressed by the abovementioned statute of this state, are generally enumerated in the first section; and in this respect it is extremely prolific, there being upwards of thirty distinct offences there enumerated, each of which may be the subject of a criminal prosecution. As the statute book may be supposed to be in the hands of every magistrate, it seems needless to transcribe the section in this place. The two succeeding sections inflict penalties for wilfully breaking, defacing, or destroying any mile-stone or public monument, unless properly authorized so to do, and for committing any of the offences, enumerated in the preceding sections, secretly in the night time, or in disguise.

By the fourth and last section of the statute, trespasses on public buildings or enclosures, belonging to any county, town, or parish, are to be prosecuted for by the treasurers of the county, town, or parish, for the time being, respectively, in a civil action,

* 3 Burrows, 1701, 1708, 1707; 8 T. R. 357.

† Stat. 1785, chap. 28.

and therefore they cannot come within the criminal jurisdiction of a justice of the peace.

The following are forms of complaints for trespass upon the statute of November 23, 1785.

For cutting down Trees, growing for Ornament : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully cut down and destroy two elm trees in a certain avenue to the dwelling-house of him the said A. B. there planted, placed, and growing, for use, shade, and ornament, on land not his own, or belonging to him the said C. D., to wit, on the land of him the said A. B. and of which he the said A. B. was the lawful owner ; he the said C. D. then and there not having the consent therefor, from him the said A. B., the owner of said land ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Person for throwing down and leaving open Bars, enclosing Land not his own : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully throw down certain bars, being part of a fence belonging to and enclosing a certain piece or parcel of land there situate ; and did then and there unlawfully leave open the same bars ; the said land, which was then and there enclosed by the fence and bars aforesaid, then and there belonging to him the said A. B., and not to him the said C. D., and was not his the said C. D.'s own ; and in which he the said C. D. then and there had no interest ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

* The same form will answer for throwing open and leaving open gates, using the word "gate," instead of bars—or for injuring, marring, and defacing any fence, using the words of the statute as descriptive of that particular offence.

Against a Person for digging up and carrying away Stones and Gravel, on Land not his own, and in which he had no Interest : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully dig up, and carry away, a certain large quantity, to wit, ten cart-loads of stones and gravel, in which he the said C. D. then and there had no interest, and which was then and there lying and being on land not his own, but on the land of him the said A. B. ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.* Wherefore &c.

Against a Person for carrying away Goods from a Wharf or Landing-Place whereof he was not a Proprietor : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully take and carry away certain goods, to wit, [*here describe the goods taken away,*] from a certain wharf, (or landing-place,) there situate, called wharf ; he the said C. D. then and there not being a proprietor or owner of the said wharf, (or landing place,) in which said goods &c., taken and carried away as aforesaid, he the said C. D. then and there had no interest, and said goods being taken and carried away as aforesaid, by him the said C. D., without the leave of any person whatever who had interest therein ; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

Against a Person for breaking the Glass, in a Building not his own : On the First Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the

* The same form will answer for digging up and carrying away ore, clay, sand, turf, or mould, roots, fruit, or plants, or for cutting down and carrying away any grass, hay, or corn, as mentioned in the same part of the first section.

county aforesaid, did unlawfully break and destroy the glass, to wit, ten panes of window glass, in a certain building there situate, not his own, but which building then and there belonged to, and was the property of him the said A. B.; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For wilfully breaking and defacing a Mile-Stone: On the Second Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, a certain mile-stone, placed and put up in a public road there, for public convenience and the information of travellers, did unlawfully and wilfully break, deface, and destroy; he the said C. D. not being properly or legally authorized so to do; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

For cutting down Trees, secretly and in the Night-Time: On the Third Section of the Statute.

A. B. of B. &c., upon his oath complains, that C. D. of &c., being an evil disposed and malicious person, on the day of now last past, with force and arms, at B. aforesaid, in the county aforesaid, did unlawfully, secretly, and in the night-time, cut down and destroy two elm trees, in a certain avenue to the dwelling-house of him the said A. B., there planted, placed, and growing, for use, shade, and ornament, on land not his own, or belonging to him the said C. D., to wit, on the land of him the said A. B., and of which he the said A. B. was then and there the lawful owner; he the said C. D. then and there not having the consent therefor from him the said A. B., the owner of said land; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

USURY.

USURY is defined to be "an unlawful contract upon the loan of money, to receive the same again with exorbitant increase."* It was anciently considered to be unlawful for a Christian to take any kind of usury, and that whoever was guilty of it was liable to be punished by the censures of the Church; and that if, *after death*, a person was found to have been a usurer while living, all his chattels and lands were forfeited to the government.† This is another instance of the strange, and as we should now say *shocking* absurdities of the English criminal code, as it *anciently* stood. To try and convict a man for a highly penal offence, *after he was dead*, must have been a curiosity even in the dark and gloomy age in which it was permitted.

The strong and general prejudice against usury, may probably be traced to the *Mosaic* laws and institutions. This and every other species of oppression should be restrained by wholesome laws; but it is asked by a writer of great authority,‡ "What reason can there be, that the lender of money should not as well make an advantage of it, as the borrower?" The same author adds, "neither do the passages in the *Mosaic* law which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness, as the lawfulness of it; for if all usury were against the moral law, why should it not be as much so in respect of foreigners, of whom the Jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, that the prohibition of it to that people, was merely *political*, and consequently doth not extend to any other nation."

The statute of Massachusetts, "for the restraining the taking of executive usury," passed March 16, 1784,§ is copied nearly *verbatim*, from the 12th of Ann, c. 16. The latter statute establishes the rate of interest at five per cent., but as to those parts

* 4 Bla. Com. 156.

† Hawk. b. 1, c. 82, s. 4.

‡ Hawk. b. 1, c. 82, s. 7.

§ Stat. 1783, chap. 55.

of it which declare all usurious contracts to be void, and which create the penalties for taking, accepting, and receiving usury, the language is substantially the same in both. The statute of 12th of Ann points out no mode in which the penalties shall be sued for and recovered. Our statute provides, that its penalties and forfeitures shall be recovered "by indictment or action of the case, one moiety thereof to the use of the Commonwealth, and the other moiety to him or them who prosecutes, complains, or sues for the same." And there is a *proviso* in this last mentioned statute, that "nothing in this act shall extend to the letting of cattle, or other usages of the like nature in practice among farmers, or maritime contracts among merchants, as bottomry, insurance, or course of exchange, as hath been heretofore accustomed."

Among the various decisions which have been had upon the construction of these statutes, (which are too numerous to be here stated,) there is one which deserves particular notice, which is, that no *penalty* can be recovered, unless there has been unlawful interest *actually taken, accepted, and received*. For to constitute the *offence*, three things must concur: 1. A contract between the parties: 2. Moneys or other things lent: 3. Above the rate of legal interest *actually received* by the lender for forbearance.*

It is here to be recollected, that, according to the decision in *Commonwealth v. Cheny*,† no person can be held to bail before a magistrate in this state, for the offence of usury. Our statute expressly authorizes a prosecution *qui tam*, in the name of a common informer, as well as by indictment. The reasons of this decision are given by Parsons C. J. in delivering the opinion of the court in that case, to which the reader is referred.‡ It has also been doubted, whether, from the construction of the several acts relative to the establishment of the present Court of Common Pleas in this state, this offence of usury, though a common misdemeanor, is not excluded from the jurisdiction of that court.

* Hawk. b. 1, c. 82, s. 8, note 1; 3 Wilson, 362.

† 6 M. R. 345.

‡ Ante.

By a subsequent statute of Massachusetts, passed January 19th, 1788,* made for the limitation of actions upon penal statutes, all prosecutions for usury, if instituted by a common informer in a *qui tam* action, shall be commenced within one year next after the offence is committed; and if prosecuted by indictment, within two years next after the offence is committed. For a general description of the offence of usury, and various decisions relating to it, see Hawk. b. 1, c. 82.—4 Bla. Com. 156.—2 Bla. Com. 455, &c.

Form of a Complaint for Usury.

A. B. of B. &c., upon his oath complains, that on the day of in the year of our Lord one thousand eight hundred and twenty, one C. D. of &c., yeoman, did lend to one E. F. the sum of dollars, and that the said E. F., for securing the repayment of the said sum of dollars, with lawful interest for the same, to the said C. D., afterwards, to wit, on the day of aforesaid, at B. aforesaid, in the county aforesaid, did give and deliver to the said C. D. a certain promissory note, bearing date the day and year last aforesaid, by which said note the said E. F. did promise to pay to him the said C. D. the said sum of with lawful interest for the same in six months after the date of the same note; and that the said C. D. afterwards, to wit, on at &c., aforesaid, unlawfully, unjustly, and corruptly, did receive, accept, and take of and from the said E. F. the sum of dollars and cents, of the moneys of him the said E. F., and by way of corrupt bargain and loan for the forbearing and giving day of payment of the said sum of from the said day of until the said day of which said sum of so as aforesaid received and taken by the said C. D. for the forbearing and giving day of payment of the said sum of from the said day of until the said day of did exceed the rate of six dollars for the loan of one hundred dollars for the year; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided. Wherefore &c.

VAGRANTS AND VAGABONDS.—See “House of Correction.”

WAY.—See “Nuisance.”

* Stat. 1788, chap. 12.

PRECEDENTS

IN

CIVIL ACTIONS.

THE following precedents are principally collected from the "American Precedents of Declarations," and consist of such forms &c. as are usually required by justices of the peace in civil actions.

In all civil actions of a personal nature, within the jurisdiction of a justice of the peace, the defendant has a right to give any special matter in evidence, under the general issue, as though specially pleaded. This right in Massachusetts is given by a statute of 1783, chap. 42, ssc. 7. The exception in that section, which refers to actions of trespass committed on real estate, will be noticed in that part of the subsequent precedents which relate to actions of trespass. It may be here noticed once for all, that no other plea than the general issue is necessary in trials upon the merits, before justices of the peace, and that the forms of such pleas will be found in their proper places among the following precedents; and that, as the justice who tries the case, cannot be of counsel for either party, no forms, either of pleas to the jurisdiction or in abatement, or of special pleas, are considered necessary for *him*, and therefore not given in this collection. When such pleas are necessary or advisable, the party will of course employ counsel.

DECLARATIONS IN ASSUMPSIT.

1. INDEBITATUS ASSUMPSIT.

On Account annexed.

In a plea of the case, for that the said A. at on
 being indebted to the plaintiff in the sum of according to
 the account hereunto annexed, in consideration thereof, then and
 there promised the plaintiff, to pay him the same sum on de-
 mand ; yet, though often requested, the said A. hath never paid
 the same, but wholly neglects and refuses so to do, to the dam-
 age &c.

Money had and received.

In a plea of the case, for that the said A. at on
 being indebted to the plaintiff in the sum of for so much
 money before that time had and received by him the said A. to
 the plaintiff's use, then and there in consideration thereof, prom-
 ised the plaintiff to pay him that sum on demand ; yet, though
 requested, the said A. has not paid the same to the plaintiff, but
 neglects and refuses so to do.

Money lent and accommodated.

In a plea of the case, for that the said A. at on
 being indebted to the plaintiff in the sum of for the like
 sum of money before that time lent and accommodated by the
 plaintiff to the said A. at his request, in consideration thereof,
 then and there promised the plaintiff to pay him the same sum
 on demand ; yet the said A., though requested, has not paid the
 same, but neglects and refuses so to do.

Money laid out and expended.

In a plea of the case, for that the said A. at on
 being indebted to the plaintiff in the sum of for so much
 money before that time laid out and expended by the plaintiff for
 the use of him the said A. and at his request, then and there in
 consideration thereof promised the plaintiff to pay him that sum
 on demand ; yet the said A., though requested, has never paid
 the same, but refuses so to do.

For Meat, Drink, &c.

In a plea of the case, for that the said A. at on
being in debt to the plaintiff in the sum of for meat, drink,
lodgings, and other necessities, by the plaintiff before that time
provided for him the said A. and at his request, according to the
account hereto annexed, then and there in consideration thereof
promised the plaintiff to pay him that sum on demand; yet,
though requested, he has never paid the same, but neglects and
refuses so to do.

For Labor and Materials.

In a plea of the case, for that the said A. at on
being indebted to the plaintiff in the sum of for certain
labor done and performed, and for divers materials found and
provided by the plaintiff for him the said A. at his request, ac-
cording to the account hereunto annexed, then and there in con-
sideration thereof, promised the plaintiff to pay him therefor, the
said sum of yet the said A., though requested, has never
paid the same to the plaintiff, but refuses so to do.

For Work and Labor with Horses, Carts, &c.

In a plea of the case, for that the said A. at on
being indebted to the plaintiff in the sum of for work and
labor, care and diligence of the plaintiff, by him with his horses,
carts, and carriages before that time done, performed, and bestow-
ed in and about the business of him the said A. at his request accor-
ding to the annexed account, in consideration thereof promised
the plaintiff to pay him therefor the said sum of dollars,
of which said A. then and there had notice; yet the said A.,
though requested, has never paid the plaintiff said sum, but
neglects and refuses so to do.

For Work and Service as a Schoolmistress.

In a plea of the case, for that the said A. at on
being indebted to the plaintiff in the said sum of for the
work, service, care, diligence, and attendance of the plaintiff as a
schoolmistress, by her, before that time done, performed, render-
ed, and bestowed in and about the teaching and instructing of
B. C., the infant daughter of the said A., in reading, needle work,
good manners, and other necessary accomplishments and quali-
fications, from to according to the annexed ac-

count, and at his request, in consideration whereof, he the said A. then and there promised the plaintiff to pay her therefor the sum of yet the said A., though requested, has never paid the same, but neglects and refuses so to do.

QUANTUM MERUIT.

For Labor and Service.

In a plea of the case, for that the said A., at on in consideration that the plaintiff, at the special instance and request of the said A. before that time, had done and performed certain work, labor, and service, according to the account annexed, for him the said A., promised the plaintiff to pay him on demand so much money as he reasonably deserved to have and receive therefor; and the plaintiff avers, that he reasonably deserves therefor the sum of dollars; of which the said A. then and there had notice; yet, though often requested, the said A. refuses to pay the same.

For Work done, and Articles found by a Tailor.

In a plea of the case, for that the said A., at on in consideration that the plaintiff, then being a tailor, at the request of the said A., had fitted, made, and delivered divers vestments and articles of clothing for the said A., according to the annexed account, with certain wares, by the plaintiff, in that behalf, then and there found and provided, then and there promised the plaintiff to pay him as much money therefor as he reasonably deserved to have for the same; and the plaintiff avers, that he reasonably deserves to have therefor the sum of yet the said A., though requested, has not paid the same, but refuses so to do.

For Rent.

In a plea of the case, for that the said A., at on in consideration that the plaintiff, at the special instance and request of the said A., had permitted him to occupy and improve a certain house [*shop or other building, as the case may be,*] from to which said A. occupied and held accordingly, promised the plaintiff to pay him on demand, as much money as he reasonably deserved to have for the same; and the plaintiff avers, that he reasonably deserves therefor, the sum of yet the said A., though requested, refuses to pay the same.

ised the plaintiff, to pay him, (or his order,) the sum of on demand, with interest till paid ; yet the said A., though requested, has never paid said sum or interest, but neglects and refuses so to do.

Partners v. Maker.

To answer unto A. & B. of partners, jointly negotiating in business and trade under the firm of A. & Co. in a plea of the case, for that the said C., at on by his note under his hand of that date, for value received promised the plaintiff, by the name of their firm, of A. & Co. to pay them or their order, the sum of on demand with interest till paid ; yet the said C., though often requested, has never paid said sum, but refuses so to do.

Payee v. Partners.

Attach A. & B. &c., partners in trade doing business under the firm of A. & Co. to answer &c. in a plea of the case, for that the said A. & B., on at by their note, signed by their name and style of partnership, of that date, for value received, promised the plaintiff, to pay him or his order the sum of on demand with interest ; yet, though requested, they have never paid the same, but refuse so to do.

Indorsee v. Maker.

In a plea of the case, for that the said A., at on by his note under his hand of that date, for value received, promised one C. to pay him or order the sum of on demand, with interest till paid ; and the said C. afterwards, on the day of by his endorsement of the same note, in writing under his hand, ordered the contents thereof to be paid to the plaintiff or his order, according to the tenor of said note, of which said A. then and there had notice, and thereby became liable, and in consideration thereof then and there promised the plaintiff, to pay him the contents of the same note, according to the tenor thereof ; yet the said A., although requested, has never paid the same, but refuses so to do.

Indorsee v. Indorsor.

In a plea of the case, for that one G., at on by his note under his hand of that date, promised the said A. (the

defendant,) to pay him or his order, the sum of at or before
 then next ensuing, but since passed, with interest there-
 for until paid; and the said A. thereafterwards, on the same
 day, by his endorsement of the same note in writing, ordered the
 contents thereof then due and unpaid to be paid to the plaintiff,
 according to the tenor thereof, and the plaintiff thereafterwards
 on made diligent search after the said G. to demand pay-
 ment of him, but could not find him, [or, if the case be so, at
 on presented said note, the same being then pay-
 able to said G., for payment, which the said G. then and there
 refuse to do,] whereof the said A. then and there had notice,
 and thereby became liable, and in consideration thereof then and
 there promised the plaintiff to pay the same; yet the said A.,
 though requested, has never paid the same, but refuses so
 to do.

ORDERS.

Payee v. Acceptor on an accepted Order.

In a plea of the case, for that one C., at on
 drew his order in writing under his hand of that date, directed
 to the said A., therein and thereby requesting the said A. to pay
 the plaintiff or his order the sum of on demand, for
 value received of the plaintiff, by the said C., and charge the
 same to the said C's account; and the plaintiff thereafter-
 wards, on the same day, presented the said order to the said A.
 for his acceptance, who then and there accepted the same;
 whereby he became liable, and then and there in consideration
 thereof promised the plaintiff to pay him the amount thereon
 due; yet the said A., though requested, has never paid the same,
 but refuses so to do.

Payee v. Drawer, Order not accepted.

In a plea of the case, for that the said A., at on
 for value received of the plaintiff, drew his order in writing un-
 der his hand of that date, directed to one C., therein and there-
 by requesting the said C. to pay the plaintiff or his order the
 sum of on demand, and charge the same to the ac-
 count of the said A.; and the plaintiff, on at present-
 ed the said order to said C. for his acceptance and payment,
 which the said C. then and there refused to do, of which the
 said A. then and there had notice, whereby he became liable
 to pay the said sum to the plaintiff, and then and there, in con-

sideration thereof, promised the plaintiff so to do ; yet, though requested, he refuses to pay the same.

On a Note for delivery of specific Articles.

In a plea of the case, for that the said A., at on by his note of hand for value received, promised the plaintiff to pay and deliver to him, or his order, gallons of New England rum, at [on or before] then next ensuing, and now past, and the plaintiff avers, that the said rum, at said time and place of delivery, was of the value of for each gallon thereof, and that he was then and there ready to receive the same ; yet the said A., though then and there requested, never delivered the same to the plaintiff, but refuses so to do.

NOTE. When the articles are payable *on demand*, a special request, or *demand* must be averred as follows : “ Yet the said A., though afterwards requested, viz. on at and at [said place of delivery,] refused to deliver the said rum to the plaintiff, according to his promise aforesaid.”

☞ The form of the plea, that is, the general issue, in an action of assumpsit, is as follows :

And the said A. B. comes and defends &c. and for plea says he never promised the plaintiff in manner and form, as he in his declaration hath alleged ; and thereof puts himself on trial.

By C. D., *his attorney.*

And the plaintiff likewise,

By E. F., *his attorney.*

The form of the record of a case before a justice of the peace will be found at the close of these precedents. The form, there inserted, will be proper, *mutatis mutandis*, in all the different forms of actions.

ACTIONS ON THE CASE.

DECEIT.

THIS species of action on the case is grounded on fraud, imposition, or express warranty ; and is susceptible of two kinds of remedy, viz. an action of *assumpsit*, or case for *deceit*.* In cases of express warranty, *assumpsit* is the most appropriate remedy, although *deceit* will lie on such warranty. It cannot be necessary to multiply precedents for this species of injury, in this collection ; because in most cases the amount of damages demanded will exceed the jurisdiction of a single justice, and because, also, this species of action is seldom resorted to without the aid of professional advice. Those which I have selected are in cases which may fall within a justice's jurisdiction. The plea, in these actions on the case, before a single justice, will always be that of *not guilty*.

On Warranty of Wines.

In a plea of the case, for that whereas the said A., on at in consideration of the sum of by the plaintiff then and there paid to the said A., did bargain and sell unto the said plaintiff gallons of wine ; and upon making said bargain and sale, the said A. did then and there warrant the said wines to be good and perfect wine and in good order, state, and condition ; yet the plaintiff avers, that the said wines were, at the time of said bargain and sale, corrupted and adulterated ; and if drank, hurtful and pernicious to the health and constitution of man ; whereby the plaintiff, upon said bargain, sale, and warranty, was then and there greatly deceived and defrauded.

For selling a Cow, belonging to another Person.

In a plea of the case, for that the plaintiff, on at bargained with the said A. [defendant,] to purchase of him a certain cow, who, knowing the same to be the cow of one D., sold the same to the plaintiff, and then and there warranted the said cow as his the said A's property, for a sum of money to be paid therefor by the plaintiff, to the said A., and the plaintiff avers, that

* Doug. 18, *Stuart v. Wilkins*.

afterwards the said D. demanded and took the said cow from the plaintiff, as his the said D's own cow, and carried the said cow away as his the said D's own property ; and so the plaintiff saith, that the said A. hath cheated and deceived the plaintiff.

For selling Liquors by short Measure.

For that the said A., at on did falsely and fraudulently deceive the plaintiff by then selling him the plaintiff a certain quantity of spirituous liquor, called as and for the quantity of two gallons, and then and there warranting the same to be and to contain that quantity ; when in truth and in fact, the said quantity of spirituous liquor so sold and warranted as aforesaid, at the time of the sale and warranty thereof, was not, nor did contain the said quantity of two gallons, but a less quantity, to wit, the quantity of six quarts, and no more ; all which the said A. then and there well knew.

For selling Wool, artfully packed.

For that the plaintiff, on at bargained with the said A. to buy of him pounds of wool, which was then and there packed and bound up into parcels, in the form and which had the appearance of fleece wool ; and the said A. by then and there warranting said wool to be fleece wool, and to be packed and bound up fairly and without deceit, and to be good and merchantable, then and there deceitfully sold the same to the plaintiff for the sum of dollars, to be thereafterwards paid by the plaintiff for the same ; and the plaintiff avers, that at the time and place of said sale, the said wool were deceitfully and fraudulently packed and bound up, and that parcels thereof were not fleece wool, nor good and merchantable wool ; but the inside thereof was wool of no value ; of all which the said A. was then and there well knowing ; and so the plaintiff saith, that the said A., in manner aforesaid, falsely deceived and defrauded the plaintiff.

(¶) The same form as this, will answer for a fraud in the sale of any other article.

For shooting a Dog.

For that whereas the plaintiff, on the day of at was possessed of a certain [spaniel] dog, of the value of as of the proper goods of the said plaintiff, whereby

he received benefit and profit ; yet the said A., well knowing the same, but maliciously contriving and intending to injure the plaintiff in this particular, then and there discharged a certain gun, loaded with gunpowder and leaden shot, at and upon said dog, whereby the said dog was mortally wounded and then and there died, whereby the plaintiff was greatly injured &c.

For keeping a Dog accustomed to bite.

For that said A., on at a certain dog accustomed to bite sheep, then and there knowingly kept, which said dog, then and there on the same day, five sheep of the plaintiff, then and there found, so grievously did bite, that three of the same, of the value of died ; and the residue of said sheep were injured and rendered of no value.

For immoderately riding a Horse.

For that the said A., on at had hired a horse of the plaintiff to ride from to for a certain sum then agreed upon, and the plaintiff delivered said horse to said A. to ride accordingly ; yet said A. so carelessly and immoderately rode said horse, that by means of tiring, and otherwise abusing said horse, the said horse died.

SLANDER.

For calling Plaintiff a Thief.

In a plea of the case, for that the plaintiff is, and from his youth hath been, a person of good name and reputation among his neighbours, for honesty and propriety of conduct, and is and always has been free from the atrocious crime of stealing ; nevertheless the said A., not being ignorant of the premises, but maliciously and wickedly to injure and destroy the plaintiff's good name and character, and to bring him into contempt and hatred among his neighbours and fellow citizens, and to expose him to the punishment by law inflicted for the crime of theft, did, on at in presence and hearing of divers citizens of said Commonwealth, with a loud voice, utter, speak, and publish the following false and malicious words following, of and concerning the plaintiff, viz. [*here insert the words spoken verbatim, with proper inuendos.*] By means of which said false, scandalous, and malicious words, the plaintiff has been greatly injured in his good name, fame, and reputation, and has been exposed to a

prosecution for the crime of stealing ; and the plaintiff has thereby suffered great anxiety and distress of mind by reason of the premiser.

¶ This form of declaration will answer for most other cases of slander by words, by preserving the form, and inserting the words spoken.

For a Libel.

In a plea of the case, for that the plaintiff is of good name &c. [*as in the preceding precedent,*] yet, &c. the said A. did compose, write, and publish a scandalous and malicious libel, wherein, among other things, it was falsely and scandalously affirmed of and concerning the plaintiff, as follows, *viz.* [*here insert the words of the libel, with proper inuendos ;*] whereas in truth and in fact, the plaintiff was not guilty of any of the misdemeanors in said libel published. By means of which said false, scandalous, and malicious libel, published as aforesaid, by him the said A., the plaintiff hath suffered great scandal and reproach, and been otherwise greatly injured in his reputation and estate.

TROVER.

For a Chest of Clothes.

In a plea of the case, for that the plaintiff, on at
was possessed of a certain chest, containing a quantity of clothes, which are particularly mentioned in the schedule hereto annexed, all of the value of dollars, as of his own property ; and being so thereof possessed, then and there, on the same day, at said casually lost the same, which said chest and articles aforesaid then and there, on the same day, came into the hands and possession of the said A. [defendant,] by finding ; yet the said A., well knowing the goods and chattels aforesaid to belong to the plaintiff, though requested, hath not delivered the same to the plaintiff, but afterwards, on the same day, converted the same to his own use.

¶ This form will answer for all cases of trover, varying the statement as to the property lost, according to the facts.

COVENANT.

The cases in which the action of Covenant is the appropriate remedy, generally relate to those subjects of litigation, which are not within the jurisdiction of a justice of the peace; such as warranty of land and the breach of the covenants in the deed of it, which generally involve the title to real estate, and cannot be decided upon in a justice's court; Charter-parties, Indentures, Leases, &c.; in most of which cases the damages demanded exceed the jurisdiction of a justice's court. No precedents therefore of declarations in cases of Covenant broken, are inserted in this collection.

DEBT.

On Bonds.

In a plea of debt, for that the said A., on at by his writing obligatory of that date, by him signed and sealed, and here in court to be produced, bound and acknowledged himself to be indebted to the plaintiff in the sum of dollars to be paid to the plaintiff on demand; yet the said A., though requested, hath never paid the same, but unjustly detains it.

On a Bond by a surviving Obligee.

In a plea of debt, for that the said A., on at by his writing obligatory of that date, by him signed and sealed, and here in court to be produced, bound himself to the plaintiff and one B. now deceased, whom the plaintiff survived, in the sum of dollars, to be paid to the plaintiff and the said B. or either of them, on demand; yet the said A., though requested, hath never paid the same to the plaintiff or said B. in his lifetime, or to the plaintiff since the decease of the said B., but detains it.

¶ The general issue in an action of debt upon bond, is *non est factum*, the form of which is as follows: "And the said A. comes and defends &c., and says, that the instrument declared on in the

plaintiff's writ and declaration, is not his deed, and of this he puts himself on trial.

By A. B., *his attorney.*

And the plaintiff likewise,

By C. D., *his attorney.*

Debt on a Judgment in a Justice's Court.

In a plea of debt, for that the plaintiff, by the consideration of C. D. Esquire, at a justice's court, holden before him the said C. D., at his dwelling-house in on recovered judgment against the said B. [defendant,] for the sum of damages and for costs of said suit, as by the record thereof there remaining appears ; an attested copy whereof is here ready to be produced ; which said judgment is now in full force and in no part satisfied, or annulled ; whereby an action hath accrued to the plaintiff to have and recover of the said B. the several sums aforesaid, amounting together to the sum of with lawful interest thereon ; yet the said B., though requested, hath not paid the same, but unjustly detains it.

¶ If a part of the judgment has been satisfied, say " which said judgment remains unsatisfied in part, *viz.* for the sum of and an action hath accrued to the plaintiff," [*as next above.*]

For Rent on a parole Lease.

In a plea of debt, for that the plaintiff by lease parole, on at demised to the said D. [defendant,] a house situated in aforesaid, to hold for one quarter of a year next ensuing, and so from quarter to quarter so long as both parties should agree ; yielding and paying the sum of for every quarter he should hold the premises so devised ; by force whereof the said D. then entered upon the premises and held them until when the sum of rent became due, and is still in the rear and unpaid ; whereby an action hath accrued to the plaintiff to recover and have the same sum, and thereof he brings this suit ; yet the said D., though requested, hath never paid the sum, but detains it.

¶ The general issue in Debt, on a judgment and other similar causes of action is *nil debet*, and is in the following form :

And the said A. B. comes and defend &c., and says, that he does not owe the plaintiff in manner and form, as he in his declaration hath alleged, and of this he puts himself on trial.

By A. B., *his attorney.*

And the plaintiff likewise,

By C. D., *his attorney.*

MILITIA.

The form of proceeding for the recovery of the penalties created by the statute of 1809, chap. 108, "for regulating and governing the militia of this Commonwealth," are all contained in the 35th section of that statute. It cannot be necessary to transcribe them into this collection, as every justice of the peace is supposed to be possessed of the volume in which they are contained. When, therefore, application is made to a justice of the peace, for the recovery of any of the penalties of the militia law, he will find every thing prepared for him, as to the form of proceeding, in the section above alluded to. There is another sufficient reason for not here copying these forms; the fluctuating state, and the constant alterations in the militia laws, render it highly probable that these alterations will continue to be made, and that the final result may be a material charge, if not a total abolition of them.

TRESPASS.

Assault and Battery.

In a plea of trespass, for that the said A., on at
with force and arms, in and upon the plaintiff did make an assault, and him then and there beat, bruised, and evil entreated, and other wrongs and injuries then and there did, against the peace, and to the damage &c.

Assault, Battery, and False Imprisonment.

In a plea of trespass, for that the said A., at on
with force and arms, made an assault upon the plaintiff, and him
then and there beat and abused, and without any lawful authority
him the plaintiff did then and there falsely imprison and hold in
duress for the space of and other wrongs then and there
did, to the great damage of him the plaintiff, against the peace,
and to the damage &c.

By Husband and Wife, for an Assault upon the Wife.

To answer unto A. B., of and C. D., the wife of him
the said A. B., in a plea of trespass, for that the said F. [defendant,]
on at with force and arms, in and upon the said
C. D. did make an assault, and her the said C. D. did then and
there beat, abuse, and ill treat, and other wrongs then and there
did, against the peace, and to the damage of said A. B. and
C. D. &c.

Trespass to personal Property.

In a plea of trespass, for that said A., at on with
force and arms, took and carried away the plaintiff's boat, of the
value of and converted the same to his own use, against
the peace, and to the damage &c.

QUARE CLAUSUM FREGIT.

Trespass on real Property.

In a plea of trespass, for that the said A., at on
with force and arms, broke and entered the plaintiff's close, situ-
ated in containing acres, and bounded as follows,
viz. and then and there, with force as aforesaid, the plain-
tiff's grass, then and there standing and growing, beat down and
destroyed, and other wrongs then and there did to the plaintiff,
against the peace &c.

☞ The general issue in actions of trespass, is *not guilty*. In
an action of trespass upon real estate, the defendant is not allowed
to give in evidence, under the general issue, any thing that may
bring the title of real estate in question. The duty of the jus-
tice in such cases, is particularly pointed out in the statute of
1783, chap. 42, sec. 2.

Form of a Justice's Record in a civil action.

Commonwealth of Massachusetts.

Suffolk ss. At a Justice's Court, held before me the subscriber, one of the justices of the peace for the county of at my dwelling-house in in said county of on the day of in the year of our Lord one thousand eight hundred and twenty

A. B., *Plaintiff.*

C. D., *Defendant.*

in a plea of for that [*here set forth the declaration.*]

The plaintiff appears and enters his action; the defendant also appears, and for plea says, that and thereof puts himself on trial; upon which plea, issue being joined, and the parties being fully heard and understood, it appears to me the said justice, that the plaintiff's declaration is proved; and that the defendant in manner and form as the plaintiff declares: It is therefore considered by me the said justice, that he the said recover against the said the sum of damage and cost of suit, taxed at

A true copy of Record. Attest,

A. B., *Justice of the Peace.*

From which judgment the said appealed to the next Court of Common Pleas, to be holden at within and for the county aforesaid, on the next, and entered into recognisance, as the law directs, to prosecute said appeal there with effect.

Attest,

A. B., *Justice of the Peace.*

The form of an execution to be used in civil actions, triable before a justice of the peace, will be found in the statute of 1784, chap. 28, sec. 3.

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